IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86- 86-6384

LARRY ROMINE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS FOR A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The petitioner, Larry Romine, asks leave to file the attached petition for writ of certiorari to the Supreme Court of the State of Georgia, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in both the Superior Court of Pickens County, Georgia and the Supreme Court of Georgia. Petitioner's affidavit in support of this motion is attached hereto.

Thomas P. Lenzer

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(404) 263-6363

IN THE SUPREME COURT OF THE UNITED STATES
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Respondent.

AFFIDAVIT OF POVERTY SUPPORTING MOTION TO PROCEED IN FORMA PAUPERIS FOR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

AFFIDAVIT

I, Larry Romine, being first duly sworn according to law, depose and say that I am the petitioner in the above-styled case; that in support of my motion to proceed without being required to prepay fees, costs. or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.

Feb 1981 was my last employment.
$250.00 per week @- 1000.00 a month total.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No set income - only few dallors a month from family to live on.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. No Set Amount - $100.00 to $150.00 or better or less- A year.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned. ONly AN inmate ACCOUNT Near At the prison - due of not being Allow to have Cash money.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Larry Romine

LARRY ROMINE

Subscribed and Sworn to Before me this 12th day of FEBRUARY, 1987.

Thomas P. Langer

Notary Public, Delton County, Ohio
My Commission Expires June 25, 1990

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QUESTIONS PRESENTED

I.

Is an Allen charge, when given in the sentencing phase of a capital murder trial when the inability of the jury to unanimously agree on what sentence to impose results in a sentence of life imprisonment, impermissibly coercive and fundamentally unfair, contrary to the Eighth and Fourteenth Amendments to the United States Constitution?

II.

Did the court's charge to the jury that evidence of petitioner's prior difficulties with his parents was introduced for a limited purpose not related to sentencing, and that such evidence could not be considered in deciding whether to sentence petitioner to death for the murder of his parents, impermissibly restrict the jury's consideration of petitioner's difficult relationship with his parents and his troubled family background as mitigating factors, thereby denying to petitioner an individualized sentencing determination contrary to Lockett v. Ohio, Eddings v. Oklahoma, and the Eighth and Fourteenth Amendments to the United States Constitution?

III.

Did the court's giving the jury an Allen charge 5 1/2 hours after receiving a written note stating that the jury was certain that they would not ever be able to reach a unanimous decision, without inquiring of the jury whether they were, in fact, deadlocked or whether further deliberations would be helpful, render petitioner's death sentences fundamentally unfair and unconstitutionally unreliable contrary to the Eighth and Fourteenth amendments to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Larry Romine, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Georgia, entered on the 2nd day of December, 1986.

OPINION BELOW

The opinion of the Supreme Court of the State of Georgia is reported at 256 Ga. 521, 350 S.E.2d 445 (1986), and is attached hereto as Appendix "A".

JURISDICTION

The judgment and order of the Supreme Court of Georgia was entered on December 2, 1986. A timely petition for rehearing was filed on December 12, 1986, with a request for stay of the remittitur pending application to this Court. Rehearing was

denied on December 17, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

Also, O.C.G.A. Section 17-10-30; 17-10-31.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was indicted for two counts of murder and one count of armed robbery arising from the deaths of his parents, Roy Lee and Avilee Romine, on March 19, 1981. After a jury trial and conviction of all counts, petitioner was sentenced to death for each murder and to a consecutive term of life imprisonment for the armed robbery.

The Supreme Court of Georgia affirmed the convictions and the life sentence for armed robbery on direct appeal on June 30, 1983. The Court reversed petitioner's death sentences because petitioner's grandfather was not permitted to testify that he did not want petitioner to be electrocuted.[1] Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), attached hereto as Exhibit "B".

The Superior Court of Pickens County, Georgia, commenced the

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1. At the resentencing, Ralph Romine, petitioner's 75 year old grandfather, testified that he did not want his grandson to be electrocuted. He also testified that his son and daughter-in-law spoke to him, "not exactly like you and me talking," but in a vision, "as Christianity and all," and "they asked me, they'd always call me Dad, and they said 'Dad, if you can don't let Larry have the electric chair.'" (2553). (Numbers in parentheses refer to pages in the trial transcript commencing on August 16,1985 in the Superior Court of Pickens County, Georgia, Judge Milam, presiding.).

resentencing, which is the subject of this petition for certiorari, on August 16, 1985. The petitioner was again sentenced to death for each murder on August 29, 1985. As statutory aggravating circumstances, the jury found that the murder of Roy Lee Romine was committed during the course of the commission of the murder of Avilee Romine and that the murder of Avilee Romine was committed during the course of the armed robbery of Avilee Romine. O.C.G.A. 17-10-30(b)(2). Petitioner's death sentences were affirmed by the Supreme Court of Georgia on December 2, 1986. Motion for rehearing was denied on December 17, 1986. A copy of the Court's order denying rehearing is attached hereto as Appendix "C".

B. Facts Relevant to the Questions Presented

1. Evidence of petitioner's troubled family background and the court's charge thereon.

Much of the evidence introduced at the resentencing trial concerned petitioner's troubled and tragic relationship with his parents. Petitioner was an only child, the product of a very strict religious upbringing. His earliest memories are of the Ludville Church of God. He recalls being in church with his parents "just about every time the door was open." (2590). Non-church related activities, such as sports and movies, were strictly forbidden by his parents. (2591). Petitioner's failed marriage to Diane Young Romine and his relationship with Ginger McIntyre were the cause of much of the difficulties that existed between petitioner and his parents. In particular, during the week preceeding the murders, Petitioner and his father quarreled bitterly about petitioner's relationship with Ms. McIntyre. The evidence of petitioner's relationship with his parents and his

troubled family history was both extensive and critical.[2]

On two separate occasions, the court charged the jury that evidence of petitioner's relationship with his parents could not be considered in determining what sentence to impose. As to this evidence, the State requested, and the court charged, as follows:

> I further charge you that evidence of prior difficulties between the Defendant and the alleged victims has been admitted for your consideration solely and only for the purpose of its illustrating, if it does so illustrate, the state of feeling between the Defendant and the alleged victims, and the bent of mind, and course of conduct on the part of the accused.
>
> Now, this evidence is admitted for your consideration only as it may illustrate such matters, and for no other purpose. Whether or not this evidence illustrates such is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose. (2874-75). (Emphasis in State's Request to Charge #5. See Appendix "D".)

Subsequently, in explaining to the jury what evidence could be considered in determining sentence, and consistent with the previous charge restricting the jury's consideration of petitioner's difficult relationship with his parents to a limited purpose not related to sentencing, the court charged the jury as

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2. As to petitioner's difficult family background, see generally the testimony of State's witnesses Diane Romine Carter (2110-2210) and Ginger McIntyre Kulsey (1843-1912, 1984-2050) and petitioner (2589-2678).

follows:

> [A]nd it now becomes your duty to determine... what punishment will be imposed... When arriving at this determination, you are authorized to consider all of the evidence introduced here in Court in this sentencing trial, presented by the State and the Defendant, unless the Court has previously instructed you to consider certain evidence introduced by the State or the Defendant for a limited purpose only, in which event such evidence shall not be considered by you in determining punishment. (2879-80).

Thereafter, contrary to its previous instructions, the court charged the jury that any evidence could be considered as mitigating and that they could impose a sentence of life imprisonment even if a statutory aggravating circumstance was found to exist. see Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981). The State's Request to Charge Number 5 and the court's entire charge are attached hereto as Appendices "D" and "E", respectively.

2. The note from the jury stating that they were deadlocked and the subsequent Allen charge.

Petitioner's jury began their deliberations at approximately 2:50 P.M. on the afternoon of August 28, 1985. (2900). At 6:15 P.M., the court assembled the jury and asked whether they were making any progress in their deliberations. The foreman responded that

> We have a pretty wide division on it right now and the consensus of most everybody here is ...

that [the jury does not] believe they can make a decision on it, about it. (2901).

A dinner recess was declared and deliberations resumed at 7:30 P.M. Shortly before 10:20 P.M., the judge again assembled the jury and inquired as to their progress. Although the foreman stated that some progress had been made, he told the court that, at least for now, a unanimous decision would not be possible and that further deliberations that night would not produce a verdict:

> THE FOREMAN: I don't think staying here any longer tonight will change anyone's mind one way or the other.
>
> THE COURT: You think a fresh start in the morning would be beneficial?
>
> THE FOREMAN: It couldn't hurt. (2903).

Deliberations resumed at 9:00 A.M. the following morning. Approximately one hour later, on its own initiative, the jury sent the following note to the court, which, in its entirety, read as follows:

> We are unable to reach a unanimous decision and are certain we will not ever be able to reach one. (2910).[3]

After determining that the jury was divided 11-1, the court instructed them to continue their deliberations:

> THE COURT: Mr. Foreman, I have a note here that

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3. Contrary to the suggestion in the opinion of the Supreme Court of Georgia that the note did not express the feeling of all the jurors, the note uses "we" twice in stating that no verdict had yet been reached and that one never would be reached. (Opinion of the Supreme Court of Georgia, page 8, hereinafter cited as Op. followed by a page reference.).

you had sent concerning your deliberations so far. Without telling me which way and what it is, can you just give me the numerical breakdown of how you stand? That's the only thing, just a numerical breakdown.

THE FOREMAN: Eleven to one.

THE COURT: Eleven to one?

THE FOREMAN: Yes sir.

THE COURT: Uh, foreman, you all have only been deliberating about six and a half, seven hours and I would like you all to consider continuing your deliberations. See what you can do with it. I'm not putting any pressure on you one way or the other. Whatever your decision is, that's your decision, but I feel like you need to deliberate on it longer.

THE FOREMAN: Well, the six or seven hours is what we've been together. But everybody has thought about it in their own mind for, since 3:00 yesterday. I believe some people thought about it in their own minds very seriously last night.

THE COURT: Well, still, uh ... I'm gonna leave you together for a while longer and see what you can do, sir. Uh, let counsel meet here at the Bench. (2909-10).

Petitioner's motion for mistrial was denied.

At 3:30 P.M., some 5 1/2 hours after receiving the jury's note, the court once again assembled the jury and asked whether they had been able to reach a verdict. The foreman replied that they had not, and without questioning the jury further, and over

objection, the court gave the jury an Allen, or dynamite, charge:

> Let me give you some other instructions at this time. You have now been deliberating upon this case for a considerable period of time. The court deems it proper to advise you further in regards to the desirability of agreement if possible.
>
> The case has been exhaustively and carefully tried by both sides and has been submitted to you for a decision and verdict if possible.
>
> While the verdict must be the conclusion of each juror and not a mere acquiesence of the jurors in order to reach an agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard and deference to the opinions of each other. A proper regard for the judgments of others will greatly aid us informing our own judgments.
>
> Each juror should listen to the arguments of other jurors. If the members of the jury differ in their views of the evidence or the mitigating or aggravating circumstances, such differences of opinion should cause them all to scrutinize the evidence more closely and to re-examine the grounds of their opinion.
>
> It's your duty to decide the issues which have been submitted to you if you can conscientiously do so.
>
> Do not hesitate to change an opinion if convinced it is wrong. However, you should never surrender honest conviction or opinions in order to be congenial or to reach a verdict solely because

> of the opinions of other jurors.
> The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the court. Now upon our exit, you may again continue your deliberations for a reasonable period of time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict in this case.
> I believe you've been going since lunch, haven't you? Since you came back from lunch?
> Why don't at this time we let you walk about, get you a Coke or a drink of water, use the restrooms and then come back in and let you start from the very beginning and see if there is any possibility of a verdict. (2924-25).

In order to impose a sentence of death, Georgia law requires that the jury do two things. First, the jury must unanimously find that at least one statutory aggravating circumstance exists beyond a reasonable doubt. O.C.G.A. Section 17-10-30(c); Davis v. State, 255 Ga. 588, 340 S.E.2d 869 (1986). Then, the jury must unanimously recommend that the defendant be sentenced to death:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the

> court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. O.C.G.A. Section 17-10-31.

However, where the jury is unable to unanimously agree on what sentence to impose, no retrial is possible and the court must sentence the defendant to life imprisonment. Hill v. State, 250 Ga. 821, 301 S.E.2d 269 (1983); Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Petitioner's motion for mistrial was again denied:

> THE COURT: [I] think the court has to look at the entire trial, the length that we spent at it, the time these jurors have had the case, and the fact that if the jurors begin to think that they can ask for a mistrial after just a few hours of deliberations, then we're going to have mistrials, mistrials, mistrials, and if opinions can be just thrown up temporarily and say we want a mistrial, it takes the responsibility off of everybody. (2930).

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN ALLEN CHARGE IS IMPERMISSIBLY COERCIVE AND FUNDAMENTALLY UNFAIR WHEN GIVEN IN THE SENTENCING PHASE OF A CAPITAL MURDER TRIAL WHEN THE JURY'S INABILITY TO UNANIMOUSLY AGREE ON WHAT SENTENCE TO IMPOSE RESULTS IN A SENTENCE OF LIFE IMPRISONMENT.

In the 91 years since this Court decided Allen v. U.S., 164 U.S. 492 (1896), the propriety of the Allen charge has been widely debated, defended and criticized by scholars and jurists alike. The charge, usually in modified form, has been approved for use in the guilt-innocence phase of criminal prosecutions in most states, including Georgia. Anderson v. State, 247 Ga. 397, 276 S.E.2d 603 (1981); Norlew v. State, 170 Ga. App. 249, 316 S.E.2d 808 (1984).[4] Allen was decided long before the advent of bifurcated capital murder trials. The policy considerations justifying its use in the guilt-innocence phase of a trial are not present in a capital punishment system such as Georgia's where the jury's inability to unanimously agree on what sentence to impose results in a sentence of life imprisonment. For this reason, the constitutionality of the Allen charge in the sentencing phase of a

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4. While it is true that it is imprecise to refer to a single Allen charge, all Allen-type charges, even as modified, share two common characteristics. First, they all stress the desirability and necessity of agreement by the jury. Second, they all instruct the jury to re-examine their opinions with a view toward reaching agreement. For a summary of cases dealing with the Allen charge in non-sentencing phases, see Op. page 10-13 and cases cited therein.

trial cannot be determined simply by citing cases analyzing and approving the Allen charge in the guilt-innocence phase of a trial. The fundamental differences in the two phases of bifurcated capital murder trials make it necessary that the constitutionality of the Allen charge in the sentencing phase of a capital murder trial be analyzed and decided in light of these differences.[5]

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5. Petitioner has found only four cases involving an Allen charge in the sentencing phase of a capital murder trial. In Rush v. State, 491 A.2d 439 (Del. 1985), the Supreme Court of Delaware held that "in a sentencing hearing in which lack of unanimity per se results in a sentence of life imprisonment," an Allen charge is "fatal as being overly coercive." 491 A.2d at 453. The Supreme Court of Florida reached the same result in Patten v. State, 467 So. 975 (Fla. 1985), and Rose v. State, 425 So.2d 521, cert. denied 461 U.S. 909 (1983). In Legare v. State, 250 Ga. 875, 302 S.E.2d 351 (1983), the Supreme Court of Georgia examined an Allen charge containing language indicating that a retrial would be possible if the jury could not reach a decision and concluded that this language was erroneous when given in a sentencing phase. Hill v. State, supra; Miller v. State, supra.

In its opinion, the Supreme Court of Georgia misinterprets Rush as well as Delaware law in several important respects. First, Delaware law does make provision for a verdict of life imprisonment and a capital sentencing jury in Delaware is expected to reach unanimity "one way or the other," the same as a Georgia capital sentencing jury. (See Op. pages 6-8.). Footnote 13 of the Rush opinon consists of a jury verdict form used in Delaware and Question 4 specifically asks the jury whether they unanimously recommend that a sentence of life imprisonment be imposed. 491 A.2d at 453, Fn. 13. In addition, the result in Rush did not depend on the specific verdict form used as the Supreme Court of Georgia apparently believes. (Op. page 7.). The holding of Rush is that an Allen charge is impermissibly coercive when given in the sentencing phase not because of the jury verdict form used, but because agreement by the jury is not necessary in the sentencing phase and after announcing that they are deadlocked, no juror voting against the death penalty is obliged under the law to "think it over."

The Allen charge, when given in the sentencing phase of a capital murder trial when the inability of the jury to unanimously agree on what sentence to impose results in a sentence of life imprisonment, is impermissibly coercive and fundamentally unfair in violation of the Eighth and Fourteenth Amendments. This constitutional question will arise every time an Allen charge is given in a state where the jury's inability to agree on what sentence to impose in a capital murder trial results in a sentence of life imprisonment. Georgia and at least 23 other states have such statutes and the Court's decision in the instant case will affect each one of them.[6] The highest courts of Delaware and Florida have decided that an Allen charge may not be given in the sentencing phase in capital murder trials in those states. Rush v. State, 491 A.2d 439 (Del. 1985); Rose v. State, 425 So.2d 521 (Fla. 1980), cert. denied 461 U.S. 909 (1983); Patten v. State, 467 So.2d 975 (Fla. 1985). Georgia has now reached a contrary result. Romine v. State, 256 Ga. 521, 350 S.E.2d 446 (1986). In the interest of furthering the orderly administration of the capital punishment statutes of the several states, the Court should grant certiorari to decide this important, unresolved constitutional question.

In a sentencing system such as Georgia's where the jury's inability to agree on what sentence to impose results in a sentence of life imprisonment, agreement by the jury is not necessary for a decision and an Allen charge, which focuses the jury's attention on the desirability of agreement where no agreement is necessary, is therefore impermissibly coercive. (In the instant case, the court prefaced its Allen charge by stating

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6. For a list of these states, see Appendix "F".

that agreement by the jury was desirable. (2924).). In the guilt-innocence phase of a trial, where a deadlocked jury results in a mistrial and a possible retrial, attempting to cause agreement by giving the jury an Allen charge can be justified by the important policy considerations of judicial economy and the interest of both the state and the defendant in having the case decided by the first jury. In the guilt-innocence phase, a decision requires agreement. In a sentencing system such as Georgia's where the jury's inability to agree on what sentence to impose results not in a mistrial but in a sentence of life imprisonment, a case can be decided without agreement by the jury and there is no longer either reason or justification for attempting to cause the jury to agree by giving them an Allen charge. Any attempt to do so is in and of itself impermissibly coercive. What Justice Sutherland said in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), about a pig in a parlor instead of a barnyard applies equally to an Allen charge in the sentencing phase; it just does not belong there.[7]

When given in the sentencing phase, an Allen charge is impermissibly coercive in another, more subtle, way. The ultimate sentencing decision can never be completely rational.[8] It may not always be possible for a juror to articulate the reason why he believes that the defendant's life should be spared. Georgia juries are specifically instructed that it is not even necessary to have a reason to spare a defendant's life.[9] After hearing an

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7. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid v. Ambler Realty Co., 272 U.S. at 388.

8. "As we have seen, however, the imposition of the death penalty can never be a wholly rational, calculated, or logical process." Conner v. State, 251 Ga. 113, 303 S.E.2d 266, 275 (1983). See also Washington v. Watkins, 655 F.2d 1346, 1376, n.57 (5th Cir. 1981).

9. The court charged the jury that "You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you, with or without reason." (2887; also 2895).

Allen charge, a juror who believes that the defendant's life should be spared, but is unable to say why, may abandon this opinion not because after further deliberations he is convincedthat death is the appropriate punishment, but because of the emphasis placed upon the necessity of agreement by the Allen charge, and the charge's closely-related suggestion, subtle but unquestioned, that his opinion may be somehow unreasonable, especially if he is in the minority, because no specific reason can be articulated to support it. The inherent coerciveness of the Allen charge in this respect increases proportionally as the number of jurors in the minority decreases. In this delicate balance, where a defendant's life may depend upon nothing more than a juror's feeling that the accused should live, an Allen charge is impermissibly coercive precisely because it may cause a juror to change his mind because his attention has been focused on the desirability of agreement, and the implication, particularly to those jurors in the minority, that their position is unreasonable and that they really should think things over.[10] This may be permissible in the guilt-innocence phase where a deadlocked jury results in a true mistrial; in the sentencing phase it is inherently coercive.

In addition, when given in the sentencing phase of a capital murder trial, the Allen charge is fundamentally unfair. In the guilt-innocence phase, a deadlocked jury is, in effect, a draw. Neither the state nor the defendant wins. For this reason, in the

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10. The State's interest, shared by the defendant and by society, is only that a case be fully and fairly deliberated by the jury, no matter what the result may be. Once the jury indicates to the court by note or otherwise that they are unable to reach a unanimous verdict, the court's efforts should be directed towards determining whether or not the jury is, in fact deadlocked, and not towards causing them to agree. At this point, as the court recognized in Rush v. State, 491 A.2d at 453, "no juror voting against the death penalty was obliged under the law to 'think it over,'" and it was constitutional error for the court to direct him to do so.

guilt-innocence phase, both the state and the defendant have something to gain if the court gives a deadlocked jury an Allen charge. Although the defendant cannot choose to take the mistrial instead of running the risk that an Allen charge will cause a guilty verdict, he has something to gain because there is the possibility that he will be acquitted. In a Georgia sentencing proceeding, however, a deadlocked jury results in a life sentence. Thus, only the state can benefit from an Allen charge; the defendant, who must be sentenced to life imprisonment if the trial terminates at this point, is forced to risk that the Allen charge will cause a unanimous sentence of death with no corresponding chance of benefit. As far as the defendant is concerned, the result is the same whether the life sentence is imposed by the court following a "mistrial" or by a unanimous jury verdict of life imprisonment subsequent to the Allen charge. The Allen charge is fundamentally unfair when given in the sentencing phase because the only effect it can have is to change a sentence of life imprisonment to a sentence of death.

In the sentencing phase of a capital murder trial, it is constitutionally irrelevant whether or not an Allen charge singles out the minority as being the only ones who should change their opinions, or implies that a retrial is possible following a mistrial or complies with A.B.A. Standard 15-4.4 (Op.p. 6-8). In a Georgia sentencing phase, an Allen charge is unconstitutional because no matter how it is modified, its intended purpose and inevitable effect is to emphasize the desirability of agreement where none is necessary. Nor does the constitutionality of the Allen charge depend upon the Supreme Court of Georgia's determination that, as a matter of state law, the inability of the jury to unanimously agree on what sentence to impose is to be called a "mistrial" instead of a verdict. The constitutional problem with the Allen charge arises because the result of this

"mistrial" is a sentence of life imprisonment.

The constitutionality of the Allen charge in the sentencing phase of a capital murder trial is an important, unresolved question that will directly effect the administration of the death penalty in 24 states. There now exists a conflict between the highest courts of Georgia, Florida, and Delaware on this issue. The Court should grant certiorari to determine whether the Allen charge, when given in the sentencing phase of a capital murder proceeding where the inability of the jury to unanimously agree on what sentence to impose results in a sentence of life imprisonment, is impermissibly coercive and fundamentally unfair, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT'S CHARGE TO THE JURY THAT EVIDENCE OF PETITIONER'S PRIOR DIFFICULTIES WITH HIS PARENTS COULD NOT BE CONSIDERED IN DECIDING WHETHER TO SENTENCE PETITIONER TO DEATH IMPERMISSIBLY RESTRICTED THE JURY'S CONSIDERATION OF PETITIONER'S DIFFICULT RELATIONSHIP WITH HIS PARENTS AND HIS TROUBLED FAMILY BACKGROUND AS MITIGATING FACTORS CONTRARY TO LOCKETT V. OHIO, EDDINGS V. OKLAHOMA, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

It is well settled that a capital sentencing jury may not be precluded from considering, "as a mitigating factor, any aspect of the defendant's character and record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586 (1978). Four years after Lockett, in Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court vacated Eddings' death sentence

because the sentencing judge believed he could not consider evidence of Eddings' turbulent family history in making his sentencing determination. Contrary to this Court's decisions in Lockett and Eddings, petitioner's sentencing jury was explicitly instructed that evidence of his prior difficulties with his parents, which was little more than evidence of his troubled family history, was introduced for a limited purpose unrelated to sentencing, and that it could not be considered by the jury in determining whether to sentence petitioner to death.[11]

At the State's request, the court first charged the jury that evidence of prior difficulties between petitioner and his parents was admitted "solely and only" to illustrate the "state of feeling between [petitioner] and the alleged victims" and petitioner's "bent of mind" and "course of conduct," and was to be considered "for these purposes only" and "for no other purpose." (2874-75; State's Request to Charge #5, Appendix "D".). Consistent with this charge, the court subsequently instructed the jury that in making their sentencing determination, evidence that was admitted for a limited purpose "shall not be considered by you in determining punishment." (2880).

Standing alone, these charges are unconstitutional.[12] Read together, they expressly prohibited petitioner's jury from considering evidence of petitioner's difficult relationship with

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11. The Supreme Court of Georgia suggests that it might be willing to overlook this error because the charges were so brief that the jury may not have heard them. (Op. at page 17). Contrary to this assertion, it is a "crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions." Francis v. Franklin, 471 U.S. at , fn. 9. See Connecticut v. Johnson, 460 U.S.73, 85, n. 14 (1983) (Opinion of Blackmun, J.).

12. The Supreme Court of Georgia apparently agrees that the challenged charges are unconstitutional. At page 17 of its opinion, the court states that "[p]resumably, evidence properly admitted at the punishment phase of a trial is relevant, somehow, to the question of punishment, even if only in a limited way." Thus the only question is whether the charge as a whole sufficiently corrects or explains the error. Francis v. Franklin, 471 U.S. 307 (1985).

his parents and his troubled family history as mitigating factors. Eddings v. Oklahoma, 455 U.S. 104, 113-114. ([I]t was as if the trial judge had instructed a jury to disregard the mitigating evidence [petitioner] proffered on his behalf."). Having determined that the charges when read in isolation are unconstitutional, the charge as a whole must be considered in order to determine whether a reasonable juror could have understood from the charge as a whole that evidence of petitioner's prior difficulties with his parents and his troubled family background could be considered as mitigating factors in determining punishment. Francis v. Franklin, 471 U.S. 307 (1985).

Unlike the burden-shifting charges found to be unconstitutional in Sandstrom v. Montana, 422 U.S. 510 (1979) and Francis v. Franklin, the charge in the instant case, when considered in its entirety, can have but one possible interpretation. The court, in clear and unambiguous language, instructed the jury that evidence of petitioner's prior difficulties with his parents could not be considered in making their sentencing determination. The court's subsequent instructions defining mitigating evidence and explaining the "life option" were not sufficient to cure or explain this constitutional defect for two reasons.[13]

First, the court's subsequent charges, quoted with approval by the Supreme Court of Georgia, did no more than contradict the previous charges that evidence of petitioner's prior difficulties with his parents could not be considered in determining what sentence to impose. "Language that merely contradicts and does

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13. Petitioner in no way concedes that the court's instructions defining mitigating evidence and the life option, that is, the option of the jury to recommend a sentence of life imprisonment even if an aggravating circumstance is found to exist, are constitutionally sufficient.

not explain a constitutionally infirm instruction will not suffice to resolve the infirmity." Francis v. Franklin, 471 U.S. at 322.[14] As was true in Franklin, a reasonable juror in the instant case could easily have resolved this contradiction by choosing to follow the unconstitutional prior difficulties charges which excluded consideration of this evidence in deciding whether to sentence petitioner to death. Stromberg v. California, 283 U.S. 359 (1931), resolves this doubt in favor of petitioner.[15]

Second, when the charge is considered as a whole, no conflict actually exists because the charges are easily reconciled. The placement of the court's second charge at the beginning of its instructions on aggravating and mitigating evidence is significant. After charging the jury on certain preliminary matters, the court told the jury that "it now becomes your duty to determine...what punishment will be imposed." (2879). Immediately thereafter, the court charged the jury that all evidence introduced in court could be considered in making this sentencing determination except for evidence that they had previously been instructed to consider for another, limited purpose not related to their sentencing determination. (2879-80). A reasonable juror

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14. Georgia law is substantially the same. In Salisbury v. State, 221 Ga. 718, 146 S.E.2d 776 (1966), the court held that when the jury is given an erroneous instruction, it can only be corrected by the court expressly withdrawing the erroneous charge and thereafter instructing the jury to disregard it. In Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979), the court held that, in the sentencing phase of a death penalty trial, the trial court complied with Salisbury by expressly withdrawing an incorrect charge.

15. In Stromberg, the Court held that where there is a possibility that the jury relied on an unconstitutional understanding of the law in reaching a verdict, that verdict must be set aside. As was true in Stromberg, in the instant case the Court cannot be sure that petitioner's jury did not follow the prior difficulties charge and sentenced petitioner to death without considering the evidence of his prior difficulties with his parents or his troubled family background as mitigating factors.

would have reconciled the court's subsequent charges that any evidence could be mitigating with this charge by simply considering as mitigating all that evidence, without limitation, that was not admitted for another, limited purpose unrelated to their determination of what sentence to impose.[16] In order for petitioner's death sentences to be constitutional, the jury must have ignored the challenged portions of the charge.

The challenged portions of the court's charge, standing alone, are unconstitutional. The charge, read as a whole, does not explain or cure the constitutional error. The Court should grant certiorari to determine whether the court's charge prevented petitioner's jury from considering evidence of his prior difficulties with his parents and his troubled family history as mitigating factors, contrary to this Court's decisions in Lockett v. Ohio and Eddings v. Oklahoma and the Eighth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

The petition for the writ of certiorari to the Supreme Court of the State of Georgia should be granted.

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16. There can be no question that the court intended to limit the jury's consideration of the evidence of petitioner's prior difficulties with his parents. Otherwise, it must be concluded that the judge gave charges that he knew had no possible relevance to the resentencing. No meaning other than the plain meaning of the words has been suggested and none is conceivable.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: DEC 2 1985

43207. ROMINE v. THE STATE.

CLARKE, Presiding Justice.

This is the second appearance of this death penalty case. Previously, this court affirmed appellant's conviction on two counts of murder, but reversed the death sentences on the ground that appellant's presentation of potentially mitigating evidence was improperly restricted. See Romine v. State, 251 Ga. 208 (305 SE2d 93) (1983). The facts are set forth in our previous opinion. Stated briefly, appellant, Larry Romine, a former gospel singer and occasional preacher whose descent into a life of drugs and adultery met with severe parental disapproval and opposition, entered his parents' home one day while they were at work, waited for their return, and then killed them both with a .16 gauge shotgun.

After a retrial on the question of sentence, Romine has again been sentenced to death. We now affirm."

1. In his first two enumerations of error, Romine argues that the trial court erred by directing the jury to continue its deliberations after the jury had communicated to the court "in clear and unambiguous language" that it was

APPENDIX "A"

"hopelessly deadlocked," and further erred by subsequently giving the jury a so-called "Allen" charge. See Allen v. United States, 164 U. S. 492 (17 SC 154, 41 LE 528) (1896).

For reasons which follow, we conclude that the trial court did not abuse its discretion by directing further deliberations, and that, inasmuch as the charge subsequently given by the court contained none of the aspects for which Allen charges have been so often--and justifiably--criticized, it was not improper.

(a) We begin our analysis with an exposition of the relevant historical facts of the trial proceeding. The presentation of evidence began (after a lengthy voir dire session) on August 21, 1985. Closing arguments and the charge of the court concluded seven days later and the jury began its deliberations at 2:50 p.m. on August 28.

At 6:15 p.m., the court asked the jury if it was making any progress in its deliberations and if it would like to break for dinner at that time. The foreman answered, "We have a pretty wide division on it right now and the consensus of most everybody here is--" The court interrupted to ask the foreman not to tell "about your division of it," and the foreman continued, "I'm not. It's that they don't believe they can make a decision on it, about it."

The court sent the jury to dinner, with instructions to return at 7:30 p.m., stating, "That'll give you an hour and fifteen minutes. Then I'll let you all deliberate a while

longer tonight. If you're not able to reach a verdict, then I'll, we'll talk about it later."

Shortly after 10:00 p.m., the court asked the jury if it had been able to make any progress since supper. The foreman answered, "some." The court asked whether the jury would like to continue their deliberations that evening, or to come back in the morning. The foreman answered, "I don't think staying here any longer tonight will change anyone's mind one way or the other." The trial court then recessed for the evening.

Deliberations resumed at 9:00 a.m. the next day. At 9:15, the court received a note from the foreman stating, "We are unable to reach a unanimous decision and are certain we will not ever be able to reach one."

At 10:00 a.m., the court discussed the note with the jury, in open court, as follows:

"The Court: Mr. Foreman, I have a note here that you had sent concerning your deliberations so far. Without telling me which way and what it is, can you just give me the numerical breakdown of how you stand? That's the only thing, just a numerical breakdown.

"The Foreman: Eleven to one.

"The Court: Eleven to one?

"The Foreman: Yes, sir.

"The Court: Uh, foreman, you all have only been deliberating about six and a half, seven hours and I would like you all to consider continuing your deliberations. See

what you can do with it. I'm not putting any pressure on you one way or the other. Whatever your decision is, that's your decision, but I feel like you need to deliberate on it longer.

"The Foreman: Well, the six or seven hours is what we've been together. But everybody has thought about it in their own mind for, since 3:00 yesterday. I believe some people thought about it in their own minds very seriously last night.

"The Court: Well, still, uh ... I'm gonna leave you together for a while longer and see what you can do, sir."

Appellant made a motion for a mistrial, on the ground that the jury was deadlocked. The motion was denied.

At 11:00 a.m., the jury asked the court to give a re-charge on mitigating circumstances, and that was done.

At 3:30 p.m., after determining that the jury had not yet reached a verdict, the court gave the following instructions to the jury: 5 1/2 more hours

"Let me give you some other instructions at this time. You have now been deliberating upon this case for a considerable period of time. The court deems it proper to advise you further in regards to the desirability of agreement if possible.

"The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict if possible.

"While the verdict must be the conclusion of each juror

and not a mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard and deference to the opinions of each other. A proper regard for the judgements of others will greatly aid us in forming our own judgments.

"Each juror should listen to the arguments of other jurors. If the members of the jury differ in their views of the evidence or the mitigating or aggravating circumstances, such differences of opinion should cause them all to scrutinize the evidence more closely and to re-examine the grounds of their opinion. It's your duty to decide the issues which have been submitted to you if you can conscientiously do so.

"Do not hesitate to change an opinion if convinced it is wrong. However, you should never surrender honest conviction or opinions in order to be congenial or to reach a verdict solely because of the opinions of other jurors.

"The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the court. Now upon our exit, you may again continue your deliberations for a reasonable period of time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict in this case.

"I believe you've been going since lunch, haven't you? Since you came back from lunch?

"Why don't at this time we let you walk about, get you a Coke or a drink of water, use the restrooms and then come back in and let you start from the very beginning and see if there's any possibility of a verdict."

Appellant's objection to the charge was overruled, and his motion for mistrial was denied.

At 5:30 p.m., the jury informed the court that it had reached a verdict. The parties were assembled and the jury's verdict of death on both counts of murder was published at 6:00 p.m.

(b) Romine refers us to three death penalty cases from the states of Florida and Delaware involving deadlocked juries and Allen charges. See Patten v. State, 467 So2d 975 (Fla. 1985); Rush v. State, 491 A2d 439 (Del. Supr. 1985); and Rose v. State, 425 So2d 521 (Fla. 1982).

Delaware law makes no provision for a verdict of life; the jury is simply asked whether it unanimously recommends a death sentence. In Rush v. State, supra, the jury told the trial court that it was unable to reach a unanimous verdict and wished to know what to do about the verdict form. The Delaware Supreme Court held that the trial court should have limited its response to the second paragraph of his supplemental instructions, viz: "Unlike an ordinary verdict where there must be unanimous agreement by all twelve jurors one way or the other, that is, guilty or not guilty, question 2 simply asks, 'Does the jury unanimously recommend that a sentence of death be imposed?' If there is not

unanimous agreement to recommend a sentence of death, the answer to that question must be 'no'."

Under Delaware law, when a jury decides that it cannot agree on a unanimous verdict of death, it has reached a verdict, and the trial court must accept it. Any instructions to deliberate further in an attempt to reach a unanimous verdict implicitly encourage the jury to reach a verdict of death, in view of the form of the verdict presented to a Delaware jury.

Romine points out that, in Georgia, where the sentencing jury is unable to agree on whether to recommend death or to recommend mercy, the trial court must sentence the defendant to imprisonment as provided by law. Miller v. State, 237 Ga. 557 (229 SE2d 376) (1976). He reasons that Georgia law is like Delaware law in that if the jury is unable to agree unanimously on death, the defendant is sentenced to life, and that we should follow the lead of the Delaware Supreme Court and hold that where the jury communicates to the court that it cannot agree on the sentence to be imposed, the trial court must accept this communication as a verdict and impose a life sentence.

Of course, the general rule in this state is that "a motion for mistrial based on the length of the jury's deliberation is within the sound discretion of the trial court. [cits.]" Cofield v. State, 247 Ga. 98, 113 (274 SE2d 530) (1981). Moreover, the trial court "is not bound to accept the jury's feeling that it is hopelessly

deadlocked." Todd v. State, 243 Ga. 539, 542 (255 SE2d 5) (1979). Romine argues that the general rule is inapplicable to sentencing proceedings, because under the rule of Miller the jury has three possible choices in the sentencing phase; i.e., the jury may (1) unanimously agree to recommend death; or (2) unanimously agree to recommend mercy; or (3) unanimously agree that it will not be able to recommend death or life. Here, Romine argues, the jury selected option (3), and the trial court should have accepted it.

However, pretermitting whether the foreman's view that the jury was hopelessly deadlocked was shared by all of the other jurors, it does not follow that, because the consequences of a hung jury on the question of sentence differ from the consequences of a hung jury on the question of guilt, the decision of whether the jury is truly deadlocked must be taken from the sound discretion of the trial judge and given to the jury.

In contrast to the policy codified in Delaware law, under Georgia law a jury is expected to review the evidence and to endeavor to reach unanimity "one way or the other" on the question of sentence, and, if possible, to affirmatively and unanimously recommend either death or mercy. OCGA §§ 17-10-2 (c) and 17-10-30 (c); Davis v. State, 255 Ga. 598 (25) (340 SE2d 869) (1986); Parks v. State, 254 Ga. 403 (14); Alderman v. State, 254 Ga. 206 (10) (32) (327 SE2d 168) (1985); Ingram v. State, 253 Ga. 622 (15) (323 SE2d 801) (1984); Allen v. State, 253 Ga. 390 (2) (321 SE2d 710)

(1984); Legare v. State, 250 Ga. 875, 76 (302 SE2d 351) (1985). Because either verdict must be unanimous, and because the jury is not informed of the consequences of its inability to reach a verdict as to sentence, instructions to deliberate further simply do not have the effect of suggesting to a Georgia jury that it should return a death sentence.

The Florida cases relied upon by Romine are in our view even less pertinent than the Rush case. Not only is a unanimous agreement unnecessary to a Florida sentencing verdict--a bare majority is all that is required--but whatever the jury's recommendation, it can be overridden by the trial judge. In Georgia, of course, the verdict, as noted above, must be unanimous, and it is binding. Spivey v. State, 253 Ga. 187 (5) (319 SE2d 420) (1984).

Consistent with our previous cases, we hold as follows: (1) Where a jury is unable to agree on a verdict, that disagreement is not itself a verdict; and (2) whether a jury is hopelessly deadlocked is an evaluation we commit to the sound discretion of the trial court, subject to appellate review for an abuse of discretion.

(c) In this case, presentation of the evidence, the arguments and the charge took the better part of seven days. After less than four hours of deliberation, the foreman reported a "wide division" and expressed doubt about the possibility of a verdict. After three additional hours of deliberation the foreman expressed further, and more

positive, doubt about the jury's ab_lity to reach a verdict. Meanwhile, however, the jury had made considerable progress, and the division had narrowed significantly.

Considering the length and complexity of the trial, the length of time the jury deliberated before declaring itself deadlocked, and the amount of progress made in the interim, we find no abuse of discretion in the court's refusal to declare a mistrial. See Thornton v. State, 145 Ga. App. 793 (245 SE2d 22) (1978).

(d) Romine next argues that "the Allen charge is an incorrect statement of the law and is impermissibly coercive when given in the sentencing phase of a death penalty trial." The Allen charge, he urges, is "inherently coercive," and for that reason has been prohibited in some states, and approved only in modified form in others. But, he argues, no matter how the charge is phrased, it is error to give it at the sentencing phase of a death penalty trial.

It has been noted that "it is somewhat imprecise to refer to a single Allen charge. Decades of judicial interpretation have produced a variety of permutations and amplifications of the original wording, some remarkably elaborate. [Cits.]" People v. Gainer, 566 P2d 997 (97 ALR3d 73, 81) (1977).

The charge originally approved in the Allen case was summarized by the United States Supreme Court as being, "in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict

must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." Allen v. United States, supra, 164 U. S. at 501.

One of the more common additions to this kind of charge is an observation that "the case must at some time be decided," or that the jury has been "selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it." People v. Joiner, supra. See also, Legare v. State, supra, 250 Ga. at 876.

This language, as well as the element approved in the original charge that admonishes jurors in the minority to

rethink their position in light of the majority's views, have drawn the most criticism--the admonition to the minority jurors on the ground that it is coercive, and the observation that the case has to be decided by some jury on the ground that it is inaccurate. Legare v. State, supra; People v. Joiner, supra. Compare Norley v. State, 170 Ga. App. 249 (3) (316 SE2d 808) (1984) and cits.

However, unless the trial judge must declare a mistrial as soon as the jury reports difficulty reaching a verdict--and we have just held to the contrary--then some supplemental instructions concerning further deliberations are desirable, perhaps even necessary. In the commentary to Rule 15-4.4 (b) of the ABA Standards for Criminal Justice, it is stated: "[T]he Allen charge should not be used. It is appropriate, however, for a court to give or repeat to the jury an instruction on its responsibilities in the course of deliberations, as provided in Standard 15-4.4 (b). This may be done when the jury has indicated its inability to reach an agreement or has deliberated for some time without reaching an agreement." Id at p. 15.143.

Standard 15-4.4 (b) "does not require the use of any particular language, but does identify the five points on which a jury might properly be advised." ABA Standards at p. 15.134. These five points are:

"(i) that in order to return a verdict, each juror must agree thereto;

"(ii) that jurors have a duty to consult with one

another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

"(iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

"(iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

"(v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict." Id. at p. 15.133.

The supplemental instructions given in this case are consistent with the ABA standard, and did not single out jurors in the minority as being the only ones who might reasonably be asked to re-examine their views, or erroneously imply that a mistrial would result in a retrial. Compare Lugaro v. State, supra; and People v. Joiner, supra.

The supplemental instructions given here were fair and accurate. The trial court did not abuse its discretion by giving them.

2. In his third enumeration, Romine argues that the trial court erred by charging, "whatever your verdict is as to penalty, it must be unanimous ..." This enumeration is answered by the preceding division of this opinion.

3. In his next two enumerations of error, Romine complains of two portions of the court's charge which, Romine argues, had the impermissible effect of limiting the jury's consideration of mitigating circumstances.

In the first instance, the court instructed the jury that evidence of prior difficulties between the defendant and his parents was introduced for the limited purpose of illustrating "the state of feeling between the defendant and the alleged victims, and the bent of mind and course of conduct on the part of the accused." Later, the court told the jury: "[Y]ou are authorized to consider all of the evidence introduced here in court in this sentencing trial, presented by the state and the defendant, unless the court has previously instructed you to consider certain evidence introduced by the state or the defendant for a limited purpose only, in which event such evidence shall not be considered by you in determining punishment."

In the second instance, the court charged that "voluntary intoxication shall not be an excuse for any criminal act ... [One who voluntarily intoxicates himself] is criminally responsible for such acts to the same extent as if he were sober." The court also charged that episodic amnesia is not a defense to a crime.

Romine argues that these charges were improper because they implied that his intoxication at the time of the crime, his memory lapses, and his prior difficulties with his parents could not be considered in mitigation. However,

while the charge in this respect perhaps is not the perfect model on which future charges should be patterned, we find that the charge, considered as a whole, did not limit the jury's consideration of mitigating circumstances.

As we have noted previously, evidence relating to guilt or innocence is relevant to sentence. See Cook v. State, 255 Ga. 565, 586 (n. 11) (340 SE2d 891) (1986); Alderman v. State, 254 Ga. 206, 210 (8) (327 SE2d 168) (1985); Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983). It may have particular importance where, as here, the case is being retried as to sentence and the jury is hearing for the first time, at the sentencing phase of the trial, evidence relating to the circumstances of the offense. In this case, moreover, the statutory aggravating circumstances contended by the state were some of the circumstances of the offense, and thus, notwithstanding Romine's conviction on two counts of murder and one count of armed robbery, the state was required to prove beyond a reasonable doubt that one count of murder was committed while the defendant was engaged in the commission of the other murder, and that the other count of murder was committed while the offender was engaged in the commission of the offense of armed robbery. OCGA § 17-10-30 (b) (2) and (c).

Romine vigorously denied the commission of these offenses. He claimed that he was drugged by his girlfriend to the point that he was only vaguely aware of his activities during the period of time in which these crimes

occurred; that his girlfriend was the real killer; and that his pre-trial confession was the product of a drug-induced hallucination and a desire to protect his girlfriend.

Because this was a retrial as to sentence in which the defendant disputed his guilt, the court was required to include in its instructions matters that ordinarily would have been covered in the charge at the guilt-innocence phase of the trial, including credibility of witnesses, expert testimony, definitions of the crimes charged, and theories of criminal liability.

At Romine's request, the court charged on involuntary intoxication as a defense to criminal liability. The state contended that Romine was voluntarily intoxicated and so the court charged that voluntary intoxication, unlike involuntary intoxication, was not a defense to criminal liability. In view of the court's subsequent instructions informing the jury that mitigating circumstances are "those which do not constitute a justification or excuse for the offenses in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame," and further specifically informing the jury that it could consider the defendant's use of drugs and alcohol in mitigation, we find no error in the court's charge on voluntary intoxication.

As for the charge that certain evidence was admitted for a limited purpose having no relevance to punishment, and not to be considered in that regard, the state--despite having

requested the charge--has not explained its necessity (or its meaning), and we are unable to perceive it. Presumably, evidence properly admitted at the punishment phase of a trial is relevant, somehow, to the question of punishment, even if only in a limited way.

Nonetheless, however the jury may have construed this portion of the charge (if they noticed it at all, given its brevity), the jury could not reasonably have concluded from the charge as a whole that the defendant's prior difficulties with his parents could not be considered in mitigation. In addition to the portions of the charge quoted previously, the court's charge on mitigating circumstances included the following:

"I charge you that a jury must be allowed to consider on the basis of all relative [sic] evidence, not only why a death sentence should be imposed, but also why it should not be imposed. The jury should consider as a mitigating factor any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death.

"Now ladies and gentlemen of the jury, I charge you that life imprisonment may be imposed even though statutory aggravating circumstances are found to exist. Under no circumstances conceivable to you, the jury, do you have to render a death penalty recommendation.

"You may set the penalty to be imposed at life based upon any mitigating or extenuating facts and circumstances that you find to exist or you may recommend a life sentence

for any reason satisfactory to you or for no reason, whether or not you find the existence of mitigating circumstances from the evidence presented to you in this case.

"You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you, with or without reason.

"I charge you that the jury is empowered to consider as mitigating anything they find to be mitigating without limitation or definition. I further charge you that the jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the Court."

The court's instructions on mitigating circumstances--which are even more extensive than we set forth above, and which, at the jury's request, were repeated in full midway through the jury's deliberations--are sufficiently clear, comprehensive and complete to dispel any reasonable possibility that the jury felt at all restricted in its consideration of mitigating circumstances. Compare Finney v. State, 253 Ga. 346 (6) (320 SE2d 147) (1984).

4. In his sixth enumeration of error, Romine complains of the court's refusal to charge that the testimony of a witness testifying under a grant of immunity or promise of leniency, although competent, should be examined with great care. In view of the lack of evidence to support the charge, we conclude that the error, if any, in the court's refusal to give it is harmless beyond a reasonable doubt.

Compare Owens v. State, 251 Ga. 313 (1) (305 SE2d 102) (1983); Fleming v. State, 236 Ga. 434, 438 (224 SE2d 15) (1976).

5. The court did not err by referring in its charge to a jury "recommendation" as to sentence, inasmuch as the charge clearly conveyed to the jury that its recommendation would be binding.

6. Romine requested the court to charge that the jury "should consider with great care and caution the evidence of any statement made by the defendant." Contrary to his 8th enumeration of error, the trial court did not err by charging the jury as requested.

7. The trial court did not err by denying Romine's request for a change of venue. Devier v. State, 253 Ga. 604 (4) (323 SE2d 150) (1984).

8. In his 10th enumeration of error, Romine contends the trial court erred by denying his motion to strike prospective juror Dobson for cause. Romine argues that she had two problems: "(1) [H]er lack of adequate supervision of small children in the home during her long sequestration would substantially impair her ability to concentrate on the evidence at trial; and (2) she had formed an opinion as to the appropriate punishment ..."

When asked by the state whether she had formed an opinion as to punishment, juror Dobson answered, "That's really hard for me to answer. I'd say at times, yes, I have." Later, the defendant's attorney asked her if she was

leaning one way or the other, and she answered that she would "have to hear the facts." She was afraid she might not be able to be fair, but she would do her best. The court questioned her about her ability to be fair and attentive. She told the court that she could make up her mind based on what she heard during the trial, and that she could make arrangements for her children.

Defendant moved to strike the juror. (Challenges were taken up outside the presence of the prospective jurors during this sequestered voir dire proceeding.) The state responded that although the juror had expressed some opinion, it was not so fixed that it could not yield to the evidence and the charge, and that her problems with her children could be handled satisfactorily.

The court denied the challenge, stating: "She said she'll do [her best] and that she'll listen to the evidence and base her opinion ... on the evidence in this case and the charge of the court ... [S]he was very alert and giving her attention to everything that was said and I think this juror, based on what I've seen of her here, she would be a very fair juror and she would give every bit of the attention she could to the case."

We find no error. Waters v. State, 248 Ga. 355 (2) (283 SE2d 238) (1981).

9. Prospective juror Andrews was asked on defense voir dire, "What does the term 'life sentence' mean to you?" She answered, "Well, to me it means that you have so many years

to serve--I don't know much about law. Is it true that you serve like seven, eight, nine years that you can be released?"

The court responded briefly that there would be two alternatives, death or life in prison, and the defense voir dire continued on other matters. After it concluded, the state was given permission to ask further questions, and it re-opened the inquiry into the juror's understanding of a life sentence, asking, "Would you finish your answer?" She stated, "Well, what I mean is, they give somebody life and then in so many years they're out again. Is that not true in some cases?"

At this point, the court questioned the juror, as follows:

"The Court: M'am, let me state this: we can't get into those and I don't know how to answer you. I think you've answered the other questions.

"But you're willing to look at the evidence in the case and treat this case and leave it up to whoever it might be somewhere else to determine whether a man should be released or not?

"A That's right.

"The Court: In other words, you're going to make your decision based on the evidence in this case and what I charge you should be done?

"A Yes, sir. I'd have to hear the evidence first.

"The Court: And what somebody else might do down the

road, you're not going to try to prejudge what they should do?

"A No.

"The Court: Or anyone else?

"A No.

"The Court: You're gong to be fair and honest with reference to this case right here?

"A That's right."

In Caldwell v. Mississippi, U. S. (105 SC 2633, LE2d) (1985) the United States Supreme Court held that a death sentence was invalid where a jury imposed it after a prosecutor argued to the jury that, if its sentence determination was unfair, it could be corrected by an appellate court. Such an argument, the Court reasoned, was misleading as to the nature of appellate review, and might impermissibly tempt the jury to delegate its sentencing responsibility to the appellate court.

Romine argues that the trial court's colloquy with prospective juror Andrews violated the principles of Caldwell v. Mississippi, supra. We need not fully examine this contention, however. The trial court's response (to a matter injected into the voir dire, in the first instance, by the defendant) was repeated to no other juror, and although the defendant did object to the response, he did not challenge the juror for cause, and she did not serve on the jury that tried the case. Thus, Romine cannot complain that any member of the jury was inappropriately instructed,

nor can he complain that this prospective juror was not stricken for cause.

We find no harmful error.

10. In his closing argument, the assistant district attorney asked the jury: "... He'd been to the hospital and then he came back rehabilitated, right?

"And you've heard a lot about rehabilitation. How many times has this man been rehabilitated? He gets rehabilitated when it comes right down to the wire. When you're in jail, you get rehabilitated. When you go to a hospital for six months, he spent six months for drug abuse, you get rehabilitated.

"Quite frankly ladies and gentlemen, if he were released from jail, do you think that he would be rehabilitated? Would he go back to drugs like he has before? Would he be able to avoid the temptation like he's admitted to you?"

Romine contends this argument violated OCGA § 17-8-76, which provides, in parts (a) and (b), as follows:

"(a) No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted by the Governor, the State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency.

"(b) If counsel for either side in a criminal case argues to or in the presence of the jury as provided in

subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error."

A mistrial is mandatory only if the argument contravenes the statute. Since the assistant district attorney did not specifically refer to pardon, parole, or other clemency, the statute was not contravened, and the trial court was not required to declare a mistrial. Finney v. State, supra, 253 Ga. at 348-49; Gilreath v. State, 247 Ga. 814 (15) (279 SE2d 650) (1981). The court views the prosecutor's argument with disfavor, but we hold that it does not sink to the level of reversible error.

The trial court did not abuse its discretion by denying the motion for mistrial (which was not made until after the conclusion of the arguments) and no other remedies (e.g., curative instructions) were requested. See Horton v. State, 249 Ga. 871 (7) (295 SE2d 281) (1982).

11. On appeal, Romine for the first time complains of additional portions of the prosecutor's closing argument. Having examined the state's argument in its entirety, we conclude that nowhere did the prosecutor seriously overstep his bounds. We find no reversible error. See Davis v. State, 255 Ga. 598 (16) (340 SE2d 869); Cook v. State, 255 Ga. 565 (12 C) (340 SE2d 891) (1986); Ford v. State, 255 Ga. 81 (8 i) (335 SE2d 567) (1985); Walker v. State, 254 Ga.

149 (14) (327 SE2d 475) (1985); Spivey v. State, supra, 253 Ga. 187 (4).

SENTENCE REVIEW

12. The jury found that, as to Count 1, the "murder of Avilee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the armed robbery of Avilee Romine." As to Count 2, the jury found that the "murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the murder of Avilee Romine." See OCGA § 17-10-30 (b) (2).

These findings are supported by the evidence. OCGA § 17-10-35 (c) (2). Compare Romine v. State, supra, 251 Ga. 208 (8).

13. The death sentences were not imposed in this case under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35 (c) (1).

14. The sentences imposed in this case are neither excessive nor disproportionate, considering both the crime and the defendant. OCGA § 17-10-35 (c) (3).

Judgment affirmed. All the Justices concur.

APPENDIX

Cargill v. State, 255 Ga. 616 (340 SE2d 891) (1986); Ingram v. State, 253 Ga. 622 (323 SE2d 801) (1984); Finney v. State, 253 Ga. 346 (320 SE2d 147) (1984); Spivey v. State, 253 Ga. 187 (319 SE2d 420) (1984); Roberts v. State, 252 Ga. 227 (314 SE2d 83) (1984); Putnam v. State, 251 Ga. 605 (308 SE2d 145) (1983); Mincey v. State, 251 Ga. 255 (304 SE2d 882) (1983); Wilson v. State, 250 Ga. 630 (300 SE2d 640) (1983); Rivers v. State, 250 Ga. 288 (298 SE2d 10) (1982); Jones v. State, 249 Ga. 605 (293 SE2d 708) (1982) Berryhill v. State, 249 Ga. 442 (291 SE2d 685) (1982); Solomon v. State, 247 Ga. 27 (277 SE2d 1) (1981); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980); Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979); Amadeo v. State, 243 Ga. 627 (255 SE2d 718) (1979); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978); Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977); Peek v. State, 239 Ga. 422 (238 SE2d 12) (1977); Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Goodwin v. State, 236 Ga. 339 (223 SE2d 703) (1976); Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975); Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974).

ENDNOTE

* The jury returned its verdict as to sentence on August 29, 1985. The completed trial transcript was filed in the superior court on December 16, 1985, and the case was docketed in this court on January 2, 1986. However, when it was learned that appellant's trial attorney had suffered a heart attack shortly after the completion of the trial, the case was stricken from the docket of this court and remanded to the trial court for a determination of whether new or additional counsel should be appointed to represent appellant on appeal. After a hearing, the trial court ruled on February 12, 1986, that the trial attorney, J. Roger Thompson, had continued to work on the appeal since the remand, and that he was physically capable of proceeding, particularly if additional counsel was appointed to assume a share of the workload. Attorney Thomas Lenzer was appointed to assist Thompson with appellant's representation, and the case was re-docketed in this court on February 18, 1986. The case was orally argued on April 22, 1986.

did not improperly infer that the defendant objected to the view. *Johnson v. State*, 236 Ga. 126, (5), 269 S.E.2d 18 (1980). The trial court also instructed the jury both during the course of the trial and in its charge that any remarks made by it during the trial were not a comment upon the case, but were only made so that the case could be fairly presented according to the law. Such instructions are sufficient, without any further showing by the appellant, to cure any possible prejudice from the above remarks. Next, the trial court did not err in not instructing the jury that the view was not to be considered as evidence, since in fact such a view is evidentiary in nature. *McDaniel v. State*, 248 Ga. 49(2), 281 S.E.2d 602 (1981); *Jordan v. State*, 247 Ga. 328(9), 276 S.E.2d 223 (1981).

[25] 7). In enumeration of error forty-four, Kilgore contends that it was prejudicial error for the trial court to allow over objection the following colloquy between the District Attorney and Sheriff Stocks: "Q. Sheriff Stocks, I'll ask you if you know if the name of Bob Price has been mentioned prominently on the news recently." A. Yes, sir. Q. When was that? A. Last night." Kilgore argues that this questioning was improper considering that the jury had been sequestered throughout the trial to prevent their hearing any accounts of the trial through the news media.

The state argues that the purpose of this questioning was to show that Bob Price, Kilgore's accomplice and co-conspirator, who had been living at Norman's widow's house, had heard his own name in the media and had probably fled from her home, just as he had fled when Kilgore was arrested. The relevancy of this questioning is marginal, especially considering that the latter discovered at Brenda Norman's home indicates Price was leaving because he had recently discovered the police were on his trail. However, the prejudice to the defendant is also marginal. The questions and answers were neutral and did not in any way disclose the content of the media coverage.

Because the colloquy lacked prejudicial impact, we find no prejudicial error in admitting the testimony. McCormick on Evidence, §§ 184, 185 (2d Ed.1972); *Owens v. State*, 248 Ga. 629, 630, 284 S.E.2d 408 (1981).

8). We have examined the remaining enumerations of error and find that they are either without merit or have been abandoned by failure to support with argument or citation of authority. *Myrow v. State*, 248 Ga. 138(6), 281 S.E.2d 600 (1981).

Finding no reversible error, we affirm the conviction.

Judgment affirmed.

All the Justices concur.

253 Ga. 208

ROMINE

v.

The STATE.

No. 39345.

Supreme Court of Georgia.

June 30, 1985.

Rehearing Denied July 23, 1985.

Defendant was convicted in the Superior Court, Pickens County, Frank C. Mills, III, J., of murder of his parents and armed robbery of his mother, and he appealed. The Supreme Court, Clarke, J., held that: (1) evidence sustained the convictions, (2) aggravating circumstances were proven beyond a reasonable doubt, (3) defendant was not entitled to change of venue, (4) trial court's instructions on aggravating and mitigating circumstances were proper, but (5) it was error to deny defendant a continuance in order to present testimony from his grandfather that the grandfather did not want to see defendant die.

Affirmed in part and reversed in part.

Weltner and Bell, JJ., dissented as to the reversal of the sentence.

1. **Homicide** ⇐=250
Robbery ⇐=24.1(3)

Evidence that defendant's parents were found shot to death in their home, that defendant had argued with decedents, that a paycheck of defendant's mother was found in a packet of papers in defendant's automobile, and that defendant admitted shooting his mother and father was sufficient to sustain his convictions for armed robbery and murder.

2. **Judges** ⇐=51(3)

Motion for recusal which was not filed until six months after the basis for disqualification were known was untimely.

3. **Criminal Law** ⇐=1081

Unified Appeal Procedure is not unconstitutional on theory that it forces the trial court out of its traditional role of neutral observer and aligns it with the prosecution.

4. **Criminal Law** ⇐=1743(1)

In view of evidence that only 11 of six jurors were excused for bias or prejudice, defendant was not entitled by change of venue.

5. **Criminal Law** ⇐=519(1)

Failure to provide defendant with names of potential jurors to interrogate ten prior to the day of trial did not entitle defendant to continuance where the failure of the prosecutor to do so was not brought to the court's attention until immediately before voir dire and where the information sought by defendant was ordinarily obtained through voir dire.

6. **Criminal Law** ⇐=641.12(1)

Assertedly fast pace of defendant's trial, which began on Monday morning and ended on Saturday evening with sessions lasting until 8:30 p.m. on Monday, 9:00 p.m. on Tuesday, 6:30 p.m. on Wednesday, 7:00 p.m. on Thursday, 10:00 p.m. on Friday, and 5:00 p.m. on Saturday, did not deprive defendant of effective assistance of counsel.

7. **Criminal Law** ⇐=814

Jury's written finding of aggravating circumstance warranting imposition of death penalty should recite all the essential, pertinent elements of the statutory aggravating circumstance found by the jury; at a minimum, the intent must be shown with sufficient clarity that a court can rationally review the jury's finding. O.C.G.A. § 17-10-30(c).

8. **Homicide** ⇐=311

Taken in conjunction with poll of jury showing that each juror had found that murder of defendant's mother was aggravated by an accompanying armed robbery and that murder of defendant's father was aggravated by the accompanying murder of defendant's mother, verdict was sufficient to reflect the jury's findings of aggravating circumstances. O.C.G.A. § 17-10-30(c).

9. **Homicide** ⇐=324

Supporting capital felony need only be a different capital felony than that with which defendant is charged, it need not be a different kind of capital felony; provision making an accompanying capital felony an aggravating circumstance warranting imposition of death penalty is applicable to multiple murders. O.C.G.A. § 17-10-30(b)(2).

10. **Homicide** ⇐=324

Murders need not be simultaneous to one another or to an aggravating circumstance for the capital felony; defendant's murder of his mother some two hours prior to the murder of his father could be considered an aggravating circumstance warranting imposition of death penalty for murder of father. O.C.G.A. § 17-10-30(b)(2).

11. **Homicide** ⇐=235

Evidence that defendant's mother was paid by check on the afternoon of the day of her death, that she was murdered by defendant some three hours later, and that her paycheck was later found in defendant's automobile was sufficient to show that defendant's murder of his mother was committed during the course of an armed robbery, regardless of whether he formed the

intent to take the check before or after the killing. O.C.G.A. § 17-10-30(b)(2).

12. Criminal Law ⇐796

Instruction that jurors were authorized to consider all the facts and circumstances, if they found there to be any, in extenuation of punishment adequately informed the jury that they were authorized to consider mitigating circumstances; trial court was not required to inform the jurors that they were "required" to consider the mitigating circumstances. O.C.G.A. § 17-10-30(b).

13. Criminal Law ⇐796

Trial court's instruction adequately made clear to the jury that they could recommend life sentence even if they found that the State had proven the existence of one or more statutory aggravating circumstances.

14. Criminal Law ⇐796

Trial court which informed the jury that they were to consider all the facts and circumstances in imposing sentence, but only as shown to them by the evidence, was adequate to forbid the jurors from considering pretrial gossip and rumors.

15. Criminal Law ⇐796

Trial court's charge was not overly suggestive of the existence of aggravating circumstances.

16. Criminal Law ⇐986.6(3)

Testimony by defendant's grandfather that he did not want to see his grandson die for the murder of the defendant's parents would have been admissible in mitigation.

17. Criminal Law ⇐608

In view of fact that trial court denied continuance on the belief that proffered testimony would be inadmissible rather than on basis that defendant could not demonstrate that only a short continuance would be necessary, in view of fact that defendant had no reason to anticipate the absence of the witness until he failed to appear on the last day of trial, and in view of evidence that the witness would have come to court had he realized the importance of his testimony, fact that defendant did not show that witness' attendance could have been secured in a short period of time did not warrant denial of the continuance.

18. Criminal Law ⇐594(1), 1166(8)

Denial of continuance sought by defendant in order for him to locate a witness, who was the defendant's grandfather and who was the father of one of the two homicide victims, to testify that he did not want to see his grandson die for the murders required reversal of the sentence.

George Thomas II, Canton, for Larry Romine.

Rafe Banks III, Dist. Atty., Cumming, Michael J. Bowers, Atty. Gen., Mary Beth Westmoreland, Asst. Atty. Gen., for the State.

CLARKE, Justice.

Appellant, Larry Romine, was indicted in Pickens County for the murder of his parents and the armed robbery of his mother. His case was tried under the Unified Appeal Procedure. The jury convicted him on all three counts and recommended that he be sentenced to death.

1. Appellant and his wife separated a few weeks prior to the murders. He spent most nights thereafter with Ginger McEntire. In this and other respects, appellant's lifestyle met with parental disapproval. After an argument with his father the weekend before the murders, appellant told Ginger not to worry about it; it wouldn't go on much longer.

He and Ginger met Thursday, March 19, 1981, shortly after 6:30 p.m., and spent that night in a motel. The next morning, appellant told Ginger, "I bet you mama and daddy didn't work today."

They did not. When appellant's mother, Avilee, failed to appear Friday morning, members of her carpool called her home. There was no answer. They contacted Reverend McClure, who lived nearby, and he entered the house through the open front door. Inside, he found the bodies of Avilee and appellant's father, Roy.

Roy, whose body lay in the kitchen, had been shot in the back. Avilee was in the bedroom, shot in the chest. Two .16 gauge shotgun waddings were recovered from the kitchen and bedroom. They were later identified as having been fired from a shotgun owned by Ginger McEntire.

Avilee's purse was missing, as was a paycheck she had received Thursday. On Monday, March 23, appellant was observed burning the contents of a box in a trash barrel. When law enforcement officers thereafter searched the trash barrel, they found a metal tool identical to one used by Avilee in her work, and a metal frame, rings and zipper that looked like the metal portions of her coin purse and pocket book. After appellant was arrested Tuesday, March 24, he asked his wife to retrieve a packet of papers from his car. She did, and turned it over to the GBI. The packet contained a $500 certificate of deposit payable to Avilee, her paycheck of March 19, her savings passbook, and various title and insurance papers bearing her name or Roy's.

In a statement given to law enforcement officers Tuesday evening, appellant admitted borrowing Ginger's shotgun, without her knowledge, on Thursday afternoon. He said that when he got home, he took two hits of LSD and loaded the gun. Then he walked the quarter mile from his house to his parents' house. No one was home and he used h's key to enter. Hearing his mother drive up, he waited for her to enter the bedroom, and then he shot her. He went into the living room and waited on the couch. The next thing appellant remembered was hearing his father drive up. (Other evidence presented at trial indicated that approximately two hours had elapsed.) Roy entered the house and went to the kitchen, carrying several sacks of groceries. Appellant shot him and left.

[1] Appellant does not challenge the sufficiency of the evidence with regard to his convictions. However, we have reviewed the evidence pursuant to Rule IV(B)(2) of the Unified Appeal procedure and we conclude that the evidence supports appellant's convictions for armed robbery and two counts of murder. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. The "first proceeding," contemplated by Rule II(A) of the Unified Appeal Procedure, was conducted June 19, 1981. Motion hearings were thereafter conducted on August 5, September 25 and October 5, 1981. See Rule II(B) of the Unified Appeal Procedure. At the October 5 hearing, appellant's trial, originally scheduled for October, was continued until the March, 1982, term of court.

On February 10, 1982, appellant filed a motion to recuse Judge Frank C. Mills, III, who had presided over all of the proceedings in the case. Appellant alleged in his motion that prior to being named to the bench in February of 1981, Judge Mills had been the district attorney for seven years; that because of his prosecutorial experience, Judge Mills was biased against the appellant; and that his bias was demonstrated by his conduct in handling the case. In a supporting affidavit appellant alleged:

"Specifically, in the pre-arraignment hearing on June 19, 1981, during the testimony of Ms. Linda Hames, the transcript shows that after five brief questions by the District Attorney, Judge Mills proceeded to ask eighteen questions.

"Further, in the pre-trial hearing held August 5, 1981, Judge Mills, after the District Attorney had completed his questions of [defense witness] Millard Farmer, engaged the witness in extensive questioning and argument as to the matters at issue."

The trial court denied appellant's motion to recuse. Appellant contends in his sixth enumeration that this denial was error.

In *State v. Fleming*, 245 Ga. 700(1), 267 S.E.2d 207 (1980), this court elected to follow the federal rule that "when a trial judge in a case pending in that court is presented with a motion to recuse accompanied by an affidavit, the judge's duty will be limited to passing upon the legal sufficiency of the affidavit, and if, assuming all the facts alleged in the affidavit to be true,

recusal would be warranted, then another judge must be assigned to hear the motion to recuse." Id. at 702, 267 S.E.2d 207. In *Hunnicutt v. Hunnicutt*, 248 Ga. 516, 283 S.E.2d 891 (1981), this court further held that the motion must not only be legally sufficient, but *timely*, i.e., made "as soon as the facts demonstrating the basis for disqualification become known." Id. at 516, 283 S.E.2d 891.

[2] All the facts alleged as a basis for the disqualification of Judge Mills were known prior to August 5, 1981. Appellant filed his motion six months later. Appellant's motion was untimely and the trial court did not err in denying the motion to recuse or in denying appellant's request to allow another judge to hear the motion.

[3] 3. In his ninth enumeration of error, appellant contends the Unified Appeal Procedure is unconstitutional. We do not agree with appellant's contention that the Unified Appeal Procedure "forces the trial court out of its traditional role of neutral overseer, aligning it with the prosecution." His remaining contentions have been decided adversely to him in *Brown v. State*, 250 Ga. 66(3), 295 S.E.2d 727 (1982) and *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981).

[4] 4. The trial court did not err by failing to grant appellant's motion for change of venue. Of the 66 jurors impaneled, only 11 were excused for bias or prejudice. These 11 jurors constituted 16.7% of the entire panel. This percentage corroborates the absence of such prejudicial publicity as would require the grant of a motion for new trial. *Messer v. State*, 247 Ga. 316(4), 276 S.E.2d 15 (1981). Appellant's eighth enumeration of error is meritless.

5. On July 21, 1981, appellant filed a motion in which he sought discovery of relationships or other ties to prospective jurors by law enforcement officers, witnesses and bailiffs. The motion was granted. The court's order of February 12, 1982, contemplated that interrogatories be submitted to the district attorney for dissemination by him to witnesses, bailiffs and law enforcement officers, and that the interrogatories be returned to the defense prior to voir dire.

A copy of the jury list was mailed to the appellant and his attorney on February 26, 1982. Appellant thereafter submitted his interrogatories to the district attorney. When the voir dire commenced the morning of March 29, the completed interrogatories had not yet been furnished to appellant because the district attorney had neglected to disseminate them to anyone. Appellant moved to continue the case so that the interrogatories could be furnished prior to voir dire. The motion was denied, but the trial court ordered that the interrogatories be completed and furnished to appellant prior to the selection of the jury.

At 8:45 p.m. on the 29th, 45 completed interrogatories were furnished to appellant. Appellant then made another motion for continuance so that he could have additional time to examine the interrogatories. This motion was denied. Voir dire continued the next day and the jury was selected March 31.

Appellant contends in his fifth enumeration of error that the trial court erred in denying his motions for continuance. We cannot agree.

[5] The district attorney should have complied with the clear terms of the February 12 order. Nonetheless, his failure to do so was not brought to the court's attention until immediately before the voir dire was scheduled to begin; the court thereafter did what it could to enforce compliance with its order, short of further delaying the case.

The information sought by appellant is ordinarily obtained from the voir dire of potential jurors. Appellant has failed to demonstrate that he relied to his detriment on an order that was discretionary, or that he was harmed by the belated compliance with the order. Motions for continuance are addressed to the sound discretion of the trial court. *Marshall v. State*, 239 Ga. 101(1), 236 S.E.2d 58 (1977). We find no abuse of discretion here.

[6] 6. In his seventh enumeration of error, appellant contends the fast pace of

the trial denied him effective assistance of counsel.

The trial began with voir dire Monday morning and ended Saturday evening. Court was in session, according to appellant, until 8:30 p.m. Monday, 9:00 p.m. Tuesday, 6:30 p.m. Wednesday, 7:00 p.m. Thursday, 10:00 p.m. Friday and 5:00 p.m. Saturday.

We note that appellant's attorney was appointed April 13, 1981, almost a year prior to the trial. His investigation was aided by a private investigator retained with funds furnished by the trial court. Counsel was assisted throughout the trial by his associate.

Except for matters discussed in Division 11, post, appellant has not shown in what way his attorney would have been more effective had the case been tried at a slower pace. As to the guilt phase of the trial, our review of the record convinces us that appellant had counsel reasonably likely to render and rendering reasonably effective assistance. *Fitts v. Glass*, 231 Ga. 658, 203 S.E.2d 515 (1974).

SENTENCE REVIEW

7. In our review of the sentence, we address first a matter not raised on appeal. The jury's written sentence verdict as to Count 1 (the murder of Avilee Romine) recited, as a statutory aggravating circumstance: "Armed robbery of said Avilee Romine." As to Count 3 (the murder of Roy Lee Romine), the verdict recited, as a statutory aggravating circumstance: "Murder of Avilee Romine."

As noted by the trial court, "The verdict as prepared does not specify the statutory aggravating circumstances in the precise language as set forth in the charge." The charge had tracked the statutory language of OCGA § 17-10-30(b)(2) (Code Ann. § 27-2534).[1]

The court asked appellant's attorney, "Do you have any objection as [to] the form of the verdict and the manner in which it's written on the form, Mr. Thomas?" Counsel replied, "Not that I'm stating at this time, Your Honor, without waiving any." Nonetheless, at the district attorney's suggestion, the trial court dealt with the subject during the poll of the jury. The court asked each juror if the juror meant by his verdict that, as to Count 1, the jury found that the offense of murder of Avilee Romine was committed while the offender was engaged in the commission of the additional capital felony, the armed robbery of Avilee Romine; and that, as to Count 3, the jury found that the murder of Roy Lee Romine was committed while the offender was engaged in the commission of the additional capital felony, the murder of Avilee Romine. Each juror responded in the affirmative.

[7] When a jury recommends a death sentence, it must designate in writing the aggravating circumstance or circumstances which it has found beyond a reasonable doubt. OCGA § 17-10-30(c) (Code Ann. § 27-2534.1). This written finding should recite all the essential, pertinent elements of the statutory aggravating circumstances found by the jury. At a minimum, the jury's intent must be shown with sufficient clarity that this court can rationally review the jury's finding. *Cf. Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980).

[8] We need not decide whether the jury's written verdict, standing alone, was a sufficient expression of its finding. The poll of the jury clarified its written finding, and absent any objection to the form of the jury's verdict, we find no error in the court's failure to require the jury to amend its written verdict to reflect more precisely its intent. *Cf. Tollhunter v. Price*, 248 Ga. 413(1), 283 S.E.2d 864 (1981).

8. In his first enumeration of error, appellant contends that the statutory aggra-

1. The court charged: ". . . as to Count One, the offense of murder of Avilee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the armed robbery of said Avilee Romine . . ." "As to Count Three, . . . the offense of murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional [capital] felony, that being the murder of Avilee Romine." Transcript, Vol. XIV, pp. 2231-32; Record, p. 336.

vating circumstances found by the jury may not stand, for several reasons.

[9] First, he contends that as to Count 2, the death penalty for the murder of Roy Romine cannot be supported by the murder of Avilee Romine, because the crime and the supporting circumstance are the same capital felony, i.e., murder. Appellant contends that the supporting capital felony must be not only a different capital felony, but a different *kind* of capital felony, than the capital felony for which the death penalty is imposed. We cannot agree. As we have held in the past, OCGA § 17-10-30(b)(2) (Code Ann. § 27-2534.1(b)(2)) is applicable to multiple murders. *Gilreath v. State*, 247 Ga. 814(16), 279 S.E.2d 650 (1981).

[10] Second, appellant contends that since the two murders in this case were not simultaneous, one was not committed while the offender was engaged in the commission of the other. We do not agree that § (b)(2) requires simultaneity of action with regard to the two offenses. *Gilreath v. State*, supra; *Peek v. State*, 239 Ga. 422, 431, 238 S.E.2d 12 (1977). As in *Peek*, the murders in this case "were committed by appellant in a relatively short period of time in what can be fairly viewed as one continuous course of criminal conduct. Thus, under the facts of this case, the jury was authorized in finding that the first murder was committed in the course of the second murder." Ibid.

Finally, appellant contends the evidence is insufficient to show that the murder of Avilee was committed during the course of an armed robbery.

[11] The evidence shows the following: Avilee was paid by check on the afternoon of the day of her death. Less than three hours later, she was murdered by her son. Within the next few days, Avilee's paycheck and other papers were found in appellant's possession and the remains of her pocketbook were found in a trash barrel in which appellant had burned the contents of a box. The evidence demonstrates that appellant, "with intent to commit theft, [took] property of another from the person or the immediate presence of another by use of an offensive weapon . . ." OCGA § 16-8-41(a) (Code Ann. § 26-1902).

From the evidence, the jury was authorized to find appellant guilty of armed robbery, and to find that the armed robbery was a statutory aggravating circumstance supporting the death penalty for Avilee's murder, and this is so regardless of whether appellant's intent to take Avilee's pocketbook arose before or after he murdered her. *Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983).

9. We find that the statutory aggravating circumstances found by the jury are supported by the evidence beyond a reasonable doubt. OCGA § 17-10-35(c)(2) (Code Ann. § 27-2537); *Jackson v. Virginia*, supra.

[12] 10. In his fourth enumeration of error, appellant contends that the sentencing charge was inadequate.

(a) The court charged: "Ladies and gentlemen, you have found the Defendant Larry Romine guilty of the offenses of murder. It is now your duty to determine the penalty that shall be imposed as punishment for those offenses as prescribed by our law. In arriving at this determination, you are authorized to consider all of the evidence received here in court as presented by the State and this Defendant throughout the entire trial. You are authorized also to consider all the facts and circumstances, if you find there to be any, in extinuation and mitigation of punishment presented by the Defendant and shown to you by the evidence in both phases of this trial."

In *Hawes v. State*, 240 Ga. 327(9) at 334, 240 S.E.2d 833 (1977), we stated that the "failure to inform the jury that they were *authorized* to consider mitigating circumstances . . . was in contravention . . ." of the requirements of our death penalty law. (Emphasis supplied.) OCGA § 17-10-30(b) (Code Ann. § 27-2534.1(b)). The charge in this case was not subject to the defect discussed in *Hawes*, and there is no merit to appellant's contention that, under *Hawes*, the court should have used the word "required" instead of the word "authorized."

(b) The court charged: "Aggravating circumstances are those which increase the guilt of the Defendant or the enormity of the offense or ... its injurious consequences. Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in all fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

"... [I]f you see fit ... to recommend mercy for the Defendant then this recommendation is solely in your discretion and is not controlled by any rule of law. You may make such recommendation with or without reason. If this should be your finding, then the Court is required by law to sentence this Defendant Larry Romine to life imprisonment. In other words ... if you find beyond a reasonable doubt that the State of Georgia has proved the existence of one or more of the aggravating circumstances given to you in this charge as to either or both counts, you nonetheless are not required to recommend that the Defendant Romine be put to death.

"You may, if you see fit, and this is a matter entirely in your discretion, provide for a life sentence for the accused Romine based upon any mitigating circumstances or reasons satisfactory to you or without reason if you see fit to do so.

"You may recommend life imprisonment even though you have found the aggravating circumstances given to you in this charge to have existed beyond a reasonable doubt."

[13] The trial court made it clear to the jury that it could recommend a life sentence even if it found that the state had proven the existence of one or more statutory aggravating circumstances beyond a reasonable doubt. *Hawes v. State*, supra; *Fleming v. State*, 240 Ga. 142(7), 240 S.E.2d 37 (1977).

The trial court did not err, as appellant contends, in failing to specifically instruct the jury that "as to mitigating circumstances [the jury] could consider anything, without limitation or definition." The court's instruction conveyed to the jury that its authority to recommend mercy was unlimited and not circumscribed by the court's definition of mitigating circumstances.

[14] (c) Appellant contends the court's charge was deficient because it did not expressly forbid the jury from considering pre-trial gossip and rumors. We note that appellant failed to request such a charge. Moreover, the court told the jury: "You are also authorized to consider all the facts and circumstances, if you find any, regarding the gravity and the seriousness of the offense and your knowledge of the personal background of this Defendant, *but only as shown to you by the evidence in both phases of this trial.*" (Emphasis supplied.) Appellant's contention is meritless.

[15] (d) We cannot agree with appellant's contention that the court's charge was overly suggestive of aggravating circumstances. The court's charge fully and fairly explained aggravation, mitigation, the choice to be made between life and death, and the jury's responsibilities in that regard.

11. For reasons which follow, however, we find that we must set aside the sentences of death imposed in this case.

Appellant's grandfather, Ralph Romine, had been subpoenaed and had attended trial until Friday evening, when he left early because he felt ill. He was instructed to return the next morning. The jury returned its verdicts of guilty Friday night.

When the sentencing phase of the trial began Saturday morning, Ralph was absent. His absence was called to the court's attention by appellant's attorney, who asked for a continuance "for a period of time sufficient to allow us to determine the physical condition of Ralph Romine and secure his attendance at court." Asked for an offer of proof as to what Ralph would testify, appellant's attorney stated: "... Ralph Romine has come to my office on several occasions ... [H]e did not want his grandson electrocuted ... [H]e had very strong reservations about it. He tells me that the Lord has dealt with him in that

matter and the taking of the life of his grandson will not bring back his son . . . He has expressed a tremendous desire to be able to tell the jury what his wishes are . . ."

The district attorney responded to this offer of proof with the suggestion that nothing that Ralph had to say would be admissible. The court asked appellant's attorney if there were other matters to which Ralph would testify. Counsel said there were, but he couldn't be more specific because Ralph had planned to formulate his testimony after hearing the evidence presented at trial. The court denied the continuance.

Immediately before appellant rested later that morning, after he had testified on his own behalf, appellant renewed his motion for continuance. The court asked, "[D]o you have any indication that it would be a short continuance?" Appellant's attorney answered, "I do not know, Your Honor."

The court then asked, "[D]o you have anything to add to your offer of proof, anything that would be admissible . . . [Y]ou haven't told me anything yet that he would say that would be admissible. Now, that's what I'm waiting to hear. You're saying that he would express his wishes that Mr. Romine not get the death penalty. That would not be admissible." When counsel was unable to supplement his offer of proof, his renewed motion for continuance was denied.

At the hearing on appellant's motion for new trial, the trial court explained its denial of the motion for continuance: "[T]he only thing that was offered in the nature of proof was that [Ralph] would testify that he was opposed to the death penalty for his grandson. And, therefore, on that basis, I denied your motion for continuance." (Emphasis supplied.)

Appellant contends the denial of his motion for continuance was error. We agree.

It is clear that the largest factor in the court's denial of continuance was the court's belief that Ralph's testimony would not have been admissible in mitigation. This court, however, has consistently refused to place unnecessary restrictions on the evidence that can be offered in mitigation at the sentencing phase of a death penalty case. See, e.g., *Brooks v. State*, 244 Ga. 574, 584, 261 S.E.2d 379 (1979); *Cobb v. State*, 244 Ga. 344(28), 260 S.E.2d 60 (1979); *Spivey v. State*, 241 Ga. 477, 479, 246 S.E.2d 288 (1978); *Brown v. State*, 235 Ga. 644(3), 220 S.E.2d 922 (1975). See also *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), which held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original, footnotes omitted.) In *Caldwell v. State*, 247 Ga. 4(7), 274 S.E.2d 330 (1981), we held that, whether or not *Lockett v. Ohio* required it, in Georgia, a mother's testimony that she loved her son and did not wish to see him executed was admissible in mitigation in a death penalty case.

[16] Ralph's testimony that he did not wish to see his grandson die would have been admissible in mitigation and the trial court's opinion to the contrary was wrong. Moreover, Ralph's testimony would have been particularly significant because he was closely related not only to the appellant but also to the victims, unlike the mother in *Caldwell*. Ralph wasn't viewing the case solely from appellant's perspective, and his opinion might well have been given considerable importance by the jury.

[17] The state contends, nonetheless, that the denial of continuance was not error because the appellant failed to show that Ralph's attendance could have been secured within a reasonable time. We agree that such a showing would be a normal prerequisite to relief. We are not prepared to hold that Ralph's testimony, although admissible, was so important that appellant was entitled to a continuance of indefinite duration. As applied to this case, however, the state's position presents several difficulties.

First, the basis of the court's denial of continuance was the court's mistaken belief that Ralph's testimony was inadmissible, rather than appellant's failure to demonstrate that only a short continuance would have been necessary.

Second, appellant had no reason to anticipate Ralph's absence until he failed to appear Saturday morning. Saturday was the last day of the trial, and appellant was forced to rest his case and to present his closing arguments prior to the luncheon recess. In these circumstances, if further efforts to secure Ralph's attendance were not mooted by the court's pronouncement that Ralph's testimony would be inadmissible, the court's denial of appellant's motion for a short continuance to ascertain the reason for Ralph's absence and to attempt to secure his presence or at least to determine how long he might be unavailable, denied appellant a reasonable opportunity to secure the attendance of his witness that morning or to establish to the court's satisfaction that the witness could be obtained within a reasonable period of time.

Finally, the record, as supplemented after trial by Ralph's testimony (see Rule IV(A)(ii)(k) of the Unified Appeal Procedure), strongly suggests that Ralph could have come to court Saturday had he realized the importance of his testimony and the importance of testifying that day or not at all. Ralph testified that he was 72 years old and had a heart condition which rendered him unable to work. He had a prescription for NTG tablets that he took as needed for chest pain. He testified that he got "pained in my heart" Friday night of the trial. The next day he wanted to testify but wasn't able to. He admitted, however, that he did not consult a physician any time during the trial week. Nor did he find it necessary to take his medicine Friday night or Saturday. He said that he felt like he ought to be in court, but he didn't think the case would go as bad as it did. And he figured he could testify later if he had to.

[18] The trial court's denial of a continuance, premised as it was on the court's failure to recognize that Ralph's testimony would have been admissible, coupled with the court's refusal to allow appellant an adequate opportunity to ascertain how long it would take to secure Ralph's attendance, was an abuse of discretion. His death sentences must therefore be set aside.

Appellant's convictions are affirmed. The sentences of death are reversed and the case remanded for a new trial on the sentences to be imposed for the murders.

Judgment affirmed in part; reversed in part.

All the Justices concur except WELTNER and BELL, JJ., who dissent as to division 11 and to the reversal.

251 Ga. 313

Charles Edward OWENS

v.

The STATE.

Gregory Hughes LUMPKIN

v.

The STATE (Two cases)

Nos. 39681, 39610 and 39611.

Supreme Court of Georgia.

June 30, 1983.

Rehearing Denied July 22, 1983.

Defendants were convicted in the Superior Court, Troup County, Dewey Smith, J., of murder, and they appealed. The Supreme Court, Clarke, J., held that: (1) trial court committed reversible error in granting State's motion in limine to prohibit cross-examination of key prosecution witnesses on their motives in testifying; (2) statements attributable to coindictee, who chose to invoke his Fifth Amendment privilege and refused to testify, were properly

43207

THE MOTION FOR A REHEARING WAS DENIED TODAY

DEC 17 1986

SUPREME COURT OF GEORGIA

ATLANTA, DEC 17 1986

The Honorable Supreme Court met pursuant to adjournment.

BY: Clarke, P.J.

The following direction was given:

LARRY ROMINE V. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 12/2/86 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withold the transmittal of such remittitur until the final disposition of the case by that court.

Presiding Justice Harold G. Clarke

APPENDIX 'C'

STATE'S REQUEST TO CHARGE NO. 5

(PRIOR DIFFIDULTIES BETWEEN PARTIES)

EVIDENCE OF PRIOR DIFFICULTIES BETWEEN THE DEFENDANT AND THE ALLEGED VICTIM HAS BEEN ADMITTED FOR YOUR CONSIDERATION SOLELY AND ONLY FOR THE PURPOSE OF IT ILLUSTRATING, IF IT DOES SO ILLUSTRATE, THE STATE OF FEELING BETWEEN THE DEFENDANT AND THE ALLEGED VICTIM AND THE BENT OF MIND, AND COURSE OF CONDUCT ON THE PART OF THE ACCUSED.

NOW, THIS EVIDENCE IS ADMITTED FOR YOUR CONSIDERATION ONLY AS IT MAY ILLUSTRATE SUCH MATTERS, AND FOR NO OTHER PURPOSE. WHETHER OR NOT THIS EVIDENCE ILLUSTRATES SUCH IS A MATTER SOLELY FOR YOU, THE JURY, TO DETERMINE, BUT YOU ARE NOT TO CONSIDER SUCH EVIDENCE FOR ANY OTHER PURPOSE.

AUTHORITY: PATTERN INSTRUCTIONS, p. 35

APPENDIX "D"

CHARGE OF THE COURT:

THE COURT: Ladies and gentlemen of the jury, as you know, the Defendant, Larry Romine, in Case No. 91R-030, Pickens Superior Court, has been found guilty as to Count I of this indictment which charges him with the murder of Avilee Romine, guilty as to Count II, which charged him with the armed robbery of Avilee Romine, and guilty as to Count III, which charged him with the murder of Roy Lee Romine.

Now the sentence as to Count I, that is the murder of Avilee Romine, and the sentence as to Count III, that is the murder of Roy Lee Romine, have been reversed and the case has been sent back here for the purpose of retrial as to sentence only.

You have been selected, chosen and sworn for the purpose of determining the sentence which will be imposed upon the Defendant as to Count I and as to Count III. You cannot alter the findings of guilt of the Defendant as to Counts I and III, even if you should disagree with it. Your sole purpose in this case is to determine the sentence which will be imposed upon the Defendant as to these two counts, that is, I and III.

When a case is retried as to sentence, both the State and the Defendant are entitled to offer evidence

on the issues of guilt or innocence, not because the validity of the conviction is at issue, but because the jury needs to examine the circumstances of the offense as well as any aspects of the Defendant's character, if any, and any other relevant matters in order to determine intelligently the question of punishment. And when I say "if any", anything that comes from the evidence that's produced during the trial of this case and not something that comes outside the trial. You are to make your decision based solely on the evidence of this case.

Moreover, the jury should know the extent of the Defendant's culpability, the aggravating factors, and the strength of the State's case in this regard, as well as mitigating factors and any weaknesses of the State's case. You can only consider the evidence which has been introduced during this trial in reaching your verdict, however.

Ladies and gentlemen of the jury, you are the judges of both the law and the facts in this case.

Ladies and gentlemen of the jury, I charge you that evidence is a means by which any fact which is put in issue is established or disproved. Evidence includes all of the testimony of the witnesses and the exhibits admitted during the trial. It also includes any facts

agreed to or stipulated to by counsel. It does not include the indictment or the opening statements or closing arguments by the attorneys.

Evidence may be either direct or circumstantial or both.

Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial. It is that evidence which points immediately to the question at issue.

Evidence may also be used to prove a fact by reference -- or inference. This is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience.

Ladies and gentlemen of the jury, I further charge you that you are made by law the sole and exclusive judge of the credibility or believeability of the witnesses, and it is for you to determine what witness or witnesses you will believe, and those which you will not believe, if there are some you do not believe.

In passing upon their credibility, you may consider all the facts and circumstances of the case, the

witnesses' manner of testifying, their intelligence, their interest or lack of interest, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, and of the occurrences to which they testify; and, you may also consider their personal credibility insofar as it may legitimately appear from the trial of this case.

If, upon a consideration of the evidence in this case, you find there is a confict in the testimony of the witnesses, or a conflict between a witness or witnesses, it is your duty to settle this conflict, if you can, without believing that any witness made a false statement. If you cannot do this, then it becomes your duty to believe that witness or those witnesses you think best entitled to belief. It is for you alone to determine what testimony you will credit and what testimony you will discredit.

I further charge you that when witnesses appear and testify in a case, they are presumed to speak the truth, unless they are impeached in some manner provided by law. In this connection, I instruct you that a witness may be impeached by:

a. Disproving the facts to which the witness

testifies;

b. By proof of general bad character;

c. By proof that the witness had been convicted of a crime involving moral turpitude;

d. By proof of contradictory statements, previously made by the witness, as to matters relevant to his or her testimony and to the case.

If any attempt has been made in this case to impeach any witness by proof of contradictory statements previously made, you must determine from the evidence:

First, whether any such statements were made, and;

Secondly, whether they were contradictory to any statements the witness made on the witness stand, and;

Thirdly, whether or not it was material to the witness' testimony and to the case.

If you find that a witness has been successfully impeached by proof of previous contradictory statements, you may disregard that testimony, unless it is corroborated by other creditable testimony, and the credit to be given to the balance of the testimony of the witness would be for you, members of the jury, to determine.

However, if a witness shall swear willfully and knowingly falsely, that witness' testimony shall be

disregarded entirely, unless corroborated by circumstances or other unimpeached evidence.

Now, it is for you, the jury, to determine whether or not a witness has been impeached, and determine the credibility of such witness and the weight his or her testimony shall receive in the consideration of the case.

Furthermore, should you find that any witness, prior to his testimony in this case from the witness stand, has made any statement inconsistent with, or to, his testimony from the stand in this case, and that such prior inconsistent statement is material to the case and the witness' testimony, then you are authorized to consider same not only for purpose of impeachment, but also as substantive evidence in the case.

Ladies and gentlemen of the jury, I further charge you that testimony has been given by certain witnesses who, in the law, are termed experts. In cases such as the one being tried, the law permits evidence of persons expert in certain lines, as to their opinions derived from their knowledge of particular matters, the ultimate weight which is given to the testimony of expert witnesses is a question to be determined by the jury. In other words, the testimony of an expert, like that of any other witness, is to be received by you and

given such weight only as you think it is properly entitled to receive. You are not bound or concluded by the opinion testimony of any witness, expert or otherwise.

Ladies and gentlemen of the jury, I further charge you that a person will not be presumed to act with criminal intent, but the jury may find such intent, or the absence thereof, upon a consideration of words, conduct, demeanor, motive, and other circumstances connected with the act for which the accused is being prosecuted.

Ladies and gentlemen of the jury, I further charge you that you may infer in this case, if you wish to do so:

(a) That the acts of a person of sound mind and discretion are the product of his will; and

(b) You may infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his acts.

Whether you make any such inference or inferences in this case is a matter solely within the discretion of the jury. Ladies and gentlemen of the jury, for the purpose of deciding the punishment to be given the Defendant, you may consider his guilt or innocence even though you cannot change the prior verdict of guilty as

to these two counts.

Ladies and gentlemen of the jury, I further charge you that a statement uncorroborated by any other evidence is not sufficient to justify a conviction.

Proof beyond a reasonable doubt that a crime has been committed may, but does not necessarily, constitute corroboration of a Defendant's statement, if any. The law does not fix the amount of corroboration necessary. You, as jurors, are judges of whether or not other evidence sufficiently corroborates a Defendant's statement so as to justify a conviction. If you find that there was a statement made by the Defendant, and corroborated by other evidence, the degree of proof necessary to convict, or in this case, to consider his guilt/innocence, is that you be satisfied of the guilt of the accused beyond any reasonable doubt.

You should consider with great care and caution the evidence of any statement made by the Defendant. The jury may believe any statement in whole or in part, believing that which they find -- they may find to be true, and rejecting that which they find to be untrue. Upon you, alone, rests the duty to apply the general rules for testing the believability of witnesses, and to decide what weight should be given to all, or any part, of any such evidence.

Now ladies and gentlemen of the jury, there has been certain statements which have been made by the defendant, introduced into evidence in this case. These statements have been read to you during the trial. However, the law does not permit these statements to be sent into the jury room with you. I'm instructing you of this so you will not wonder where the documents are and why they have not been sent out with you. That's the only reason I make reference to that again.

Ladies and gentlemen of the jury, I charge you that facts and circumstances, which merely place upon the Defendant a grave suspicion of the crime charged, or which merely raise a speculation or conjecture of the Defendant's guilt, are not sufficient to authorize a conviction of the Defendant.

I further charge you that evidence of prior difficulties between the Defendant and the alleged victims has been admitted for your consideration solely and only for the purpose of its illustrating, if it does so illustrate, the state of feeling between the Defendant and the alleged victims, and the bent of mind, and course of conduct on the part of the accused.

Now, this evidence is admitted for your consideration only as it may illustrate such matters, and

for no other purpose. Whether or not this evidence illustrates such is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

I further charge you, ladies and gentlemen of the jury, that a person shall not be found guilty of a crime when at the time of the conduct constituting the crime, the person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to the criminal act. "involuntary Intoxication" means intoxication caused by: (a) consumption of a substance through excusable ignorance, or (b) the coercion, fraud, artifice, or contrivance of another person.

I further charge you, ladies and gentlemen of the jury, that our law provides that voluntary intoxication shall not be an excuse for any criminal act. It provides further that if a person's mind, when unexcited by intoxicants, is capable of distinguishing between right and wrong and reason, and acting rationally, and he voluntarily deprives himself of reason by consuming intoxicants, and while under the influence of such intoxicants, he commits a criminal act, he is criminally responsible for such acts to the same extent as if he were sober.

I further charge you, ladies and gentlemen of the jury, that episodic amnesia, which is circumscribed by the parameters of the episode, is not, in and of itself, a defense for a crime committed during that period. This result must be reached for amnesia is a neutral circumstance, or symptom, unless connected to a precipitating cause.

Ladies and gentlemen of the jury, I further charge you that under the laws of our State, a sentence of death shall not be imposed unless the jury finds, beyond a reasonable doubt, that at least one or more statutory agrravating circumstances exist and I will further charge you on these aggravating circumstances later.

The State is not required to prove that at least one or more statutory aggravating circumstances exist beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt means just what it says. It is the doubt of a fair-minded, impartial juror, honestly seeking the truth. It is a doubt based upon common sense and reason. It does not mean a vague or arbitrary notion, but is a doubt for which a reason can be given, arising from a consideration of the evidence,

the lack of evidence, a conflict in the evidence, or a combination of these.

After giving consideration to all of the facts and circumstances of this case, your minds are wavering, unsettled, or unsatisfied, then that is a doubt of the law and you should find that the State has not proven the statutory aggravating circumstances as required by law; but, if that doubt does not exist in your minds as to the State having proven the statutory aggravating circumstance or circumstances, then you would be authorized to find that the State had proven at least one or more of the statutory aggravating circumstances.

Ladies and gentlemen of the jury, I further charge you that every person concerned in the commission of a crime is a party to it, and may be charged with and convicted of, commission of the crime.

A person is concerned in the commission of a crime only if he:

a. Directly commits the crime; or

b. Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; or

c Intentionally aids or abets in the commission of the crime; or

d. Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

Ladies and gentlemen of the jury, I charge you that mere association by one, with other persons involved in the commission of a crime, without more, will not, of itself, authorize a jury to find such person guilty of consent in, or concurrence in, the commission of the crime, unless the evidence shows, beyond a reasonable doubt, that such person aided and abetted in the actual perpetration of the crime, or participated in the criminal endeavor.

I further charge you that the mere presence of a person at the scene of the commission of a crime at the time of its perpetration, without more, will not, of itself, authorize a jury to find the person who was merely present, guilty of consent in, and concurrence in, the commission of the crime; unless the evidence shows beyond a reasonable doubt that such person committed the alleged crime, or that such person aided and abetted in the actual perpetration of the crime, or participated in the criminal endeavor.

Ladies and gentlemen of the jury, I further charge you that any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that

the crime was committed and that he was a party to it, even though the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or is not amenable to justice, or has been acquitted.

I further charge you in this case that the sentence of death shall not, and cannot be imposed unless you find beyond a reasonable doubt that the Defendant either:

(a) committed the murders himself; or

(b) he, himself, attempted to kill the victim; or

(c) intended that deadly force be used by another to accomplish the criminal enterprise.

Now ladies and gentlemen of the jury, as I have previously charged you, in this case, the Defendant is charged in Count I with the murder of Avilee Romine and in Count III with the offense of the murder of Roy Lee Romine and it now becomes your duty to determine, within the limits prescribed by law, what punishment will be imposed for these offenses. You will not be concerned with the punishment as to Count II, armed robbery.

In arriving at this determination, you are authorized to consider all of the evidence introduced

here in Court in this sentencing trial, presented by the State and the Defendant, unless the Court has previously instructed you to consider certain evidence introduced by the State or the Defendant for a limited purpose only, in which event such evidence shall not be considered by you in determining punishment. You shall also consider the facts and circumstances, if any, in extenuation, mitigation, and aggravation of punishment.

Mitigating or extenuating facts or circumstances are those which do not constitute a justification or excuse for the offenses in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to its injurious consequences.

Ladies and gentlemen of the jury, under the laws of this State, a person found guilty of murder shall be punished by:

(a) death; or

(b) life imprisonment

Now, under our laws, a sentence of death shall not be imposed unless the jury finds, beyond a reasonable doubt, that at least one or more statutory aggravating circumstances exist, recommends the death penalty in

it's verdict, and designates in it's verdict, in writing, the statutory aggravating circumstance or circumstances, which it finds from the evidence, to exist in this case beyond a reasonable doubt.

Under the laws of this State, the following may constitute statutory aggravating circumstances:

Where the offense of murder was committed while the Defendant was engaged in the commission of another capital felony. In this connection, I charge you that the offense of murder is a capital felony under our laws.

In this connection, I also charge you that the offense of armed robbery is a capital felony under our law.

In this connection, I charge you that a person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing shows an abandoned and malignant heart.

I further charge you that a person commits the

offense of armed robbery when, with the intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article or device having the appearance of such weapon.

I charge you that a finding of statutory aggravating circumstances shall only be based upon evidence, convincing your minds beyond a reasonable doubt, as to the existence of the statutory aggravating circumstance as to each count. The statutory aggravating circumstances offered by the State are as follows:

As to Count I, the offense of murder of Avilee Romine was committed while the offender was engaged in the commission an additional capital felony, that being the armed robbery of Avilee Romine.

As to Count III, the offense of murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the murder of Avilee Romine.

Now, ladies and gentlemen of the jury, whether or not any one or more of the statutory aggravating circumstances which I have just given you in charge exist beyond a reasonable doubt in this case is a matter solely for you, the members of the jury, to decide and determine from the evidence in this case. When you

retire to begin your deliberations as to the penalty to be imposed in this case you will be given a written copy of these statutory instructions as to statutory aggravating circumstances to be used by you during your deliberations. I caution and instruct you, however, that such written instructions are not evidence and are not to be considered by you as evidence in this case. They are merely and solely for the purpose of aiding you in remembering what the statutory instructions are which the Court has given you in charge, and they are sent out with you for that purpose alone and no other.

I charge you, ladies and gentlemen, that if you determined the aforementioned statutory aggravating circumstances which I have given you which relate to Count I or as to Count III exist beyond a reasonable doubt, then you would be authorized to consider death as a possible punishment for either or both counts. Each count is to be considered by you separately.

However, even if you should find the existence beyond a reasonable doubt of the aforementioned statutory aggravating circumstance, as to either or both counts, you are not required to recommend the imposition of the death penalty. Notwithstanding the fact that you may find the existence beyond a reasonable doubt of the statutory aggravating circumstances, you

may still choose to recommend that a life sentence be imposed.

However, before you would be authorized to recommend the imposition of the death penalty, as to Count I or Count III or both, you must find the statutory aggravating circumstances as related to Count I and/or Count III to exist beyond a reasonable doubt.

I charge you that a reasonable doubt is an essential test in a finding of the existing of a statutory aggravating circumstance.

Ladies and gentlemen of the jury, I further charge you that mitigating circumstances are those which do not constitute a justification or excuse for the offense of murder, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame of the Defendant, or otherwise offering a basis for not imposing the death penalty.

I charge you that a jury must be allowed to consider on the basis of all relative evidence, not only why a death sentence should be imposed, but also why it should not be imposed. The jury should consider as a mitigating factor any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death.

I charge you that the jury is empowered to consider as mitigating anything they find to be mitigating without limitation or definition. I further charge you that the jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the Court.

I charge you, members of the jury, that even if you find beyond a reasonable doubt that the State has proven the existence of the statutory aggravating circumstance as related to either one of the Counts given you in this charge, you are nevertheless not required to recommend that the accused be put to death. You shall consider the mitigating circumstances presented by the evidence, if any. You may, if you see fit, and this is a matter entirely within your discretion, provide for a life sentence for the accused because of any mitigating circumstances presented by the evidence. You may also recommend mercy, that is, a life sentence, for any reason satisifactory to you, or for no reason at all, regardless of whether or not you find the existence of mitigating circumstances from the evidence presented to you in this case.

Now generally speaking, the Defendant, by way of the evidence has offered certain mitigating circumstances, such as his age, his susceptibility to

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dominance by other persons, his use of drugs and alcohol, the amount and degree of culpability in the performance or commission of the acts which were done and the fact that he has changed since the time of the murder. These are not all but are some of the mitigating circumstances contended by the Defendant and you may consider these to be mitigating circumstances if you so find them to be. They are not necessarily mitigating circumstances unless they are found to be so by you, the jury.

Ladies and gentlemen of the jury, you may likewise consider the nature of the killings, the circumstances that existed at the time of the killings, the severity of the injuries causing the deaths as well as the acts committed at the time and the defendant's character, insofar as it may have been shown by the evidence. These may be considered as aggravating circumstances. But these are not necessarily aggravating circumstances unless you find them to be so.

Now the foregoing mitigating circumstances and aggravating circumstances that I have instructed you on are merely examples of mitigating and aggravating circumstances in evidence but they do not in any way limit you in what you may consider to be aggravating or mitigating circumstances for whatever reason you believe.

Now ladies and gentlemen of the jury, I charge you that life imprisonment may be imposed even though statutory aggravating circumstances are found to exist. Under no circumstances conceivable to you, the jury, do you have to render a death penalty recommendation.

You may set the penalty to be imposed at life based upon any mitigating or extenuating facts and circumstances that you find to exist or you may recommend a life sentence for any reason satisfactory to you or for no reason, whether or not you find the existence of mitigating circumstances from the evidence presented to you in this case. Further, if you find from the evidence beyond a reasonable doubt, the existence in this case of the statutory aggravating circumstances as given you in charge by the Court, then you would be authorized to recommend the imposition of a death penalty, but you would not be required to do.

If you should find from the evidence in this case beyond a reasonable doubt, the existence of the statutory aggravating circumstances as given you in charge by the Court, you would also be authorized to sentence the Defendant to life imprisonment.

You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you, with or without reason.

Now, ladies and gentlemen of the jury, you may return any one of two verdicts as to the penalty in each count in this case. In this respect, we have prepared form of verdict for you to assist you in arriving at your verdict in this case. With reference to Count I, the form of verdict we have prepared for you is as follows: It says Count I. Then it says as to Count I:

A. We, the jury, fix the penalty at life imprisonment and if this should be -- excuse me. And if this should be your verdict as to Count I, in this event, the Defendant would be sentenced to serve the remainder of his life in the penitentiary.

The next form of verdict on Count I would be:

B. We, the jury, recommend the death penalty be imposed and we find the following statutory aggravating circumstance and, uh, to-wit, colon, and there is a blank space. In this blank space, if you find beyond a reasonable doubt a statutory aggravating circumstance as given you in charge and you desire to impose the death penalty, then you must write in that statutory aggravating circumstance.

In the event that that is your verdict in Count 1, as I say it would be necessary that you write out the statutory aggravating circumstance that you find to exist and which you have based the death penalty upon.

Also, whichever is your verdict in this particular Count, you should circle with "A" or "B", which ever is the punishment which you have fixed in this case. If it's "A", you'll circle "A", put a circle around "A". If it's "B", you'll put a circle around "B".

As to Count III, you would follow the same procedure. The form of verdict would be the same as to Count I, except it relates to Count III, that is the death of Roy Lee Romine. If your punishment as to Count III is life imprisonment then you would circle "A" and your verdict would be "A, we, the jury, fix the penalty at life imprisonment."

If, on the other hand, you found beyond a reasonable doubt that the statutory aggravating circumstances exist and further that you recommend the death penalty, you would circle "B" and the form of your verdict would be "B, we, the jury, recommend that the death penalty be imposed and we find the following statutory aggravating circumstance", to-wit, colon, and there you would write out the statutory aggravating circumstances I have previously given you in charge and which you base your recommendation of death. If the death penalty is your verdict as to Count I or as to Count III, then the Defendant would be sentenced to be put put to death in the manner prescribed by law.

Now, members of the jury, I caution and instruct you that any -- let me say one other thing at this point, uh, I'll get to it in just a minute though.

Whatever your -- whatever penalty is to be imposed, within the limitations of the law as I have instructed you, is a matter solely for you members of the jury to determine and if the Court has made any remark, or done or failed to do any act which may have caused you to believe that the Court has expressed any opinion, I instruct you not to consider the same and you should disregard it completely.

Now, members of the jury, whatever your verdict is as to penalty, it must be unanimous, it must be in writing, dated, signed by your foreperson and returned and published into Court.

Also, I want you to write in, if you should find the death penalty, you should write that in with ink and also the foreperson's signature and date should be put in with ink so that this would be permanent, if that should be your verdict.

Now the Court has prepared for you a paper entitled "Verdict as to Penalty" stating the name and style of the case and which contains all of the forms of verdict as to penalty which I have instructed you that you may return in this case. You may, if you care

to do so, return your verdict as to penalty, whatever it may be, on this particular paper by completing the particular form of verdict you wish to return in this case, and by having your foreperson date and sign that particular form of verdict, whichever it may be. The forms listed on this paper, that is "A" or "B" portion should be circled, as I previously instructed you, but the sentence not used by you should be stricken out or "X"'d out by you, leaving only the particular form of verdict you decide upon, dated and signed by your foreperson.

Now, ladies and gentlemen of the jury, that will complete my instructions to you as a jury as a whole. I want to tell you this, however. What we intend to do, we realize that the jury room is extremely small back there and, uh, what we're going to do is clear the courtroom and we'll also clear the little corridor between the two sets of doors in back so that nobody can be there peeping in on you and we're going to leave you in here. This door will be shut also. And we're going to leave you in here when you come back.

I'm going to let you go to the jury room first while I instruct the two alternate jurors and clear the courtroom. Then you will be brought back in here.

There will be a Bailiff at the outer door back

there and there will be a Bailiff at this door here. If you need anything during this period of time, you knock on the door and tell the Bailiff you need to talk to the court. If it's something further you need, it will be necessary that we have the attorney's present, the court reporter present, and the defendant present. So that will be the procedure which you will follow.

So at this time, Mr. Bailiff, I'm going to let you take the twelve jurors, not the alternates, and, uh, I believe that's Mr. Wade Long, an alternate, and Mackey John Falls are the two alternates. You all will remain here and I will instruct you. Then I'll let you go outside, and then we'll get the courtroom ready for the twelve jurors to come back and begin their deliberation.

Mr. Bailiff, if you'll take charge of the twelve jurors and carry them to the jury room at this time. If they'd like to use the restroom or get a Coke, let them do it at this time.

(Jury leaves courtroom)

THE COURT: Two alternate jurors in the case. Gentlemen, you have been permitted to stay with the jury up to this point. However, under the laws of our state, at this point, you must be separated from them.

However, you will still be sequestered, that is,

STATES WHERE THE COURT MUST IMPOSE A
LIFE SENTENCE WHEN THE JURY IS UNABLE TO
UNANIMOUSLY RECOMMEND A SENTENCE OF DEATH

ARKANSAS: Ark. Stat. Ann. Section 41-1302(3)

COLORADO: Colo. Rev Stat. Section 16-11-103(2)(d)

DELAWARE: Del. Code Ann. Title 11, Section 4209(d)(3); Rust

FLORIDA: see Patten and Rose

GEORGIA: O.C.G.A. Section 17-10-30, -31, Hill, Miller

ILLINOIS: Ill. Ann. Stat. Ch. 38, Section 9-1(g) (Smith-Hurd)

LOUISIANA: La. Code Crim. Proc. Ann. Article 905.8 (West)

MARYLAND: Md. Ann. Code Article 27 Section 413(k)(2)

MASSACHUSETTS: Mass. Gen. Laws Ann. Ch. 279 Section 70 (West)

MISSISSIPPI: Miss. Code Ann. Section 99-19-103

MISSOURI: Mo. Rev Stat. Section 565.030.4

NEW HAMPSHIRE: N.H. Rev. Stat. Ann. Section 630:5(V)

NEW JERSEY: N.J. Stat. Ann. Section 2C:11-3(3)(c) (West)

NEW MEXICO: N.M. Stat. Ann. Section 31-20A-3

NORTH CAROLINA: N.C. Gen. Stat. Section 15-A-2000(b)

OKLAHOMA: Okla. Stat. Ann. Title 21 Section 701.11 (West)

PENNSYLVANIA: Penn. Stat. Ann. Title 42 Section 9711(c)(1)(v

SOUTH CAROLINA: S.C. Code Ann. Section 16-3-20(c) (La. Co-op)

SOUTH DAKOTA: S.D. Codified Laws Ann. Section 23A-27A-1

TENNESSEE: Tenn Code Ann. Section 39-2-203(h)

TEXAS: Tex. Code Crim. Proc. Ann. Section 37.071(e)

UTAH: Utah Code Ann. Section 76-3-207(3)

VIRGINIA: Va. Code Section 19.2-264.4(E)

WYOMING: Wyo. Stat. Section 6-2-102(e)

APPENDIX "F"

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY ROMINE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

I.

Whether the propriety of the giving of an alleged "Allen charge" should be reviewed by this Court as the issue was decided below upon an independent and adequate state ground?

II.

Whether the propriety of the instructions at Petitioner's resentencing trial should be reviewed by this Court as this issue was decided below upon an independent and adequate state ground?

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NO. 86-6384

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY ROMINE,

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v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Larry Romine, was indicted in June 1982 by the grand jury of Pickens County, Georgia, for the murders of his parents, Avilee Romine and Roy Lee Romine, and for the armed robbery of Avilee Romine. Upon a trial by jury, Petitioner was convicted on all three counts. Petitioner was sentenced to death on both charges of murder and to a consecutive life sentence on the armed robbery charge. A motion for new trial was filed on April 8, 1982, and was denied on August 9, 1982. An extraordinary motion for new trial was filed on August 24, 1982, and denied on September 29, 1982. On appeal to the Supreme Court of Georgia, the state appellate court affirmed Petitioner's convictions and armed robbery sentence but set aside his two death sentences based upon a denial of his motion for a continuance at the sentencing trial in order to introduce

the testimony of Petitioner's grandfather. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983). The state court remanded the case for a new trial on the sentences to be imposed for the murders. Id.

A new sentencing trial was had in the Pickens County Superior Court on August 16-29, 1985. The jury imposed a death sentence for the first count of murder upon finding that "the offense of murder of Avilee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the armed robbery of Avilee Romine." As to the other murder count, the jury imposed a death sentence, finding that "the offense of murder of Roy Lee Romine was committed while the offender was engaged in the commission of an additional capital felony, that being the murder of Avilee Romine." Petitioner's death sentences following the sentencing retrial were affirmed on direct appeal. Romine v. State, 256 Ga. 521, ___ S.E.2d ___ (1986).

A review of the facts presented at Petitioner's resentencing trial is necessary for this Court's determination of whether or not this petition should be granted. Thus, a summary of the evidence submitted at the resentencing trial is presented at this time. The crimes occurred March 19, 1981, and were discovered March 20, 1981.

Roy Lee Romine, Appellant's father, was employed as a small machine mechanic at Georgia Tufters in Calhoun, Georgia. (T. 1299-1300). On the day that Roy Lee was killed, he worked from 5:51 a.m. to approximately 5:00 p.m. (T. 1350-51). The company had two insurance policies on Roy Lee providing for double indemnity in the amount of $44,000. (T. 1347). These proceeds have been paid to Roy Lee's estate. (T. 1348). Appellant was not the first named beneficiary of these two policies. Id. Roy Lee also had three policies in a profit sharing plan, one of which had paid $5,289 to the estate, and two other policies in the amounts of $11,532 and $13,573 which had not yet been paid. (T. 1349). Avilee Romine was the first

named beneficiary on these three policies while Appellant was the second beneficiary. Id.

Patsy Blalock was the insurance and claims clerk at Lacy Mills in Fairmount, Georgia, where Avilee Romine, Appellant's mother, had been employed for almost thirty-three years. (T. 1368-69). Avilee had worked thirty-two hours the week in which she had been murdered and was also paid for the preceding weeks' work. (T. 1373). Avilee left work with her paycheck at approximately 3:55 p.m. on the day that she was killed. (T. 1377). $11,000 has been paid to her estate. (T. 1382-83). Roy Lee was the named beneficiary. (T. 1384).

Ruth Jordan worked at Lacy Mills with Avilee, and the two women had been in a carpool together with some others. (T. 1395-96). Avilee would generally leave her car at Watson's store, a location approximately 1 1/4 miles from her house. (T. 1401). On March 19, 1981, the carpool dropped Avilee off at the store between 4:15 and 4:20 p.m. (T. 1402). Avilee got out of the car carrying a shirt, her pocketbook, a newspaper, and a paper bag with a thermos in it. (T. 1403).

The next morning, the carpool stopped at the store to pick Avilee up but she was not there. (T. 1415-16). The two women, Mrs. Jordan and Mary Cawley, waited a bit as Avilee had been experiencing some car trouble. (T. 1415-16). They called the Romine residence once from the store but got no answer. Id. The two women then decided to check the route to the Romine residence and arrived at the house. Id. Mrs. Jordan eventually went to the front door, knocked on it, and it began opening. Id. She was surprised because Avilee had become nervous about burglaries and would lock her front door and keep a chair propped in front of it. (T. 1413-14).

The two women then drove to Appellant's house, which was approximately 1/2 mile from his parents. (T. 1397-98; 1418). There was no answer at Appellant's house at approximately 6:45 a.m. (T. 1418). The two women went to a nearby preacher's house and asked him to check on the Romines while the two women

went on to work. (T. 1419-20). At work that day, Mrs. Jordan's boss told her that the Romines were dead. (T. 1420). The two women left work and went by the house sometime before noon. (T. 1420, 1423). As they talked to a deputy, Appellant and his wife Dianne drove up in Appellant's red car. (T. 1420-21). Appellant seemed to be in a state of shock and said he "couldn't believe it." (T. 1421). Mrs. Jordan saw Appellant later that day at his house, and Appellant stood at a window, when no one else was in the room, and said he did not see how it could happen with his parent's house "so peaceful-looking." (T. 1424, 1427-28). Appellant said he must have been asleep when his mother was killed. (T. 1424-25). Appellant also said that he had seen his father go home about 6:00 p.m. on the date of the murders. Id. Appellant said that he went to work after 6:00 p.m. the night before. (T. 1426).

Harvey Weems lived approximately 1/2 mile from the Romines. (T. 1486-88). He had previously seen Appellant in a red car. (T. 1488). On the day of the murders, he saw Avilee drive home from work at approximately 3:50 p.m. (T. 1490-91). While standing outside at approximately 5:50 p.m., Weems saw Roy Lee Romine go by in his black truck with a jug of milk and a loaf of bread visible on the seat. (T. 1492-93).

R.T. Hightower lived on the other side of the Romines and approximately 1/2 mile from Appellant. (T. 1519, 1524). On the day of the murders, Mr. Hightower was coming home from work when he saw Appellant at the driveway of his parents' house. (T. 1527-28).

Anthony McClure was pastor of the Ludville Church of God in 1981 and had met both Appellant and the Romines through the church. (T. 1554-55, 1557). On the morning of March 20, 1981, he was home with his two children when the two ladies in the carpool with Avilee asked if he knew if anything was wrong at the Romines. (T. 1561). He went to the house twice, the first time in the early morning and saw that the Romines' car and truck were still there. (T. 1562-63). He knocked on the door,

got no answer, and left. Id. He went back at approximately 9:00 or 9:30 a.m. and noticed that the door was open a bit. Id. He went in, took a few steps, and saw Roy Lee lying to the left in the kitchen with what appeared to be a bag of groceries near him. (T. 1564). He could tell from that distance that Roy Lee was dead. Id. He went on through the house to check on Avilee and found her in the first room beyond the kitchen. Id. He could tell that she was dead. Id. He went straight to the phone, called the operator, and waited for police to arrive. Id. The police, the G.B.I., and Ralph Romine (Appellant's grandfather) came. (T. 1565-66). He recalled telling the G.B.I. at the time that he could see no cars at Appellant's house. (T. 1570).

Narendra Patel was employed as the night clerk and manager of the Big Five Motel in Calhoun, Georgia, in March 1981. (T. 1600-1601). The motel was approximately a one hour drive from Appellant's home. Id. Appellant checked in the motel during the early evening on the date of the murders. (T. 1602-1603). As Appellant said there were two people in his party, he was charged the rate for two persons. (T. 1604-1605, 1607).

Boyce Pass was employed at the Davis Chevrolet-Oldsmobile place in Calhoun in March 1981. (T. 1608). Appellant had financed a car from there and for some reason the car had been brought back to the dealership. (T. 1609-1610). While alone at the dealership at lunch one day, a young woman asked him to unlock Appellant's car so she could get something out of it. (T. 1611). As he unlocked the door, she said, "It's under that floormat on the driver's side in the back." Id. With a screwdriver he removed a piece of paneling; as he held up the mat, she retrieved a large white envelope. Id.

Roy Young was Appellant's father-in-law in March 1981. (T. 1626-27). He knew the Romine family through the Ludville Church of God. (T. 1627). On the morning of March 20, 1981, Roy Lee's sister called his home and told him something was

wrong at Appellant's parents'. (T. 1628). He went to Appellant's house. (T. 1628-30). Upon finding no one home, he went to Roy Lee's house and met Appellant's grandfather and preacher McClure coming out of the house. (T. 1630). They told him that the Romines had been stabbed to death. (T. 1631). Roy Young said he would try to find his daughter and Appellant. Id. He met Appellant driving "slower than usual." (T. 1632). He stopped Appellant and told him that his parents had been killed, and Appellant reacted by grabbing his head and crying. (T. 1633). Roy Young identified a photograph of a trash barrel behind his house where Appellant burned marijuana and other items after the funeral. (T. 1638-40). Roy Young also retrieved the billfold of his son-in-law, Tony Johnson, from Appellant's car at the Chevrolet place. (T. 1643-46).

Moselle Eubanks, Appellant's aunt, had tried to call Appellant's mother about 5:00 p.m. on the day of the murders but got no answer. (T. 1679, 1681-82). At 9:15 or 9:20 the next morning, Appellant stopped by and told her he had applied for a job. (T. 1683). He asked her if she had heard from his parents because he had seen both cars under their carport that morning. (T. 1683-84). She told him that she had not and that she had gotten no answer when she tried to call the night before. (T. 1683-85). He seemed nervous and said he had to leave. Id. After Appellant left, she got a phone call from Ginger McIntyre, Appellant's girlfriend. (T. 1685-86). Ginger told her that a Mitchell or Michael Romine and his wife had been stabbed, but Mrs. Eubanks replied that she did not know them. (T. 1686). Ginger said that she was worried about Appellant and that he was supposed to be there and then hung up the phone. About fifteen to twenty minutes later, Appellant returned with his father-in-law and told her that someone had killed his parents. (T. 1687-88).

Tony Johnson was Appellant's brother-in-law in 1981. (T. 1800). Johnson had gotten in late from a job one night in

January, 1981 and was in bed when Appellant stopped by Johnson's trailer and blew the horn of his red Nova about 1:00 a.m. (T. 1800-1801). Johnson explained that it was his practice when coming late at night, as he had that night in January, to lie his keys and wallet on the washing machine which was in the bathroom of his trailer. (T. 1802). Appellant and Johnson had a drink while Appellant asked Johnson for help in getting a job. (T. 1802). After Appellant went to the bathroom, he left. Id. The next day, Johnson found that his billfold, containing at least $800.00 with a deposit slip filled in, was missing. (T. 1803-1804). His father-in-law, Roy Young, later returned his billfold after the murders had occurred. (T. 1804, 1806). The money was missing but everything else, including the deposit slip, was intact. (T. 1805).

Ginger McIntyre first met Appellant around Thanksgiving 1980. (T. 1843, 1847). She and Dianne Romine had become friends. Id. One night, Dianne visited her and asked Ginger to go out with Appellant because Dianne wanted to date someone else. (T. 1849). At first Ginger said no, then agreed as a favor to Dianne. (T. 1850). After her first date with Appellant, she began visiting Appellant more frequently. Around the time Dianne and Appellant moved into their new house beside Appellant's parents, Dianne asked Ginger not to see Appellant anymore. (T. 1851). Ginger agreed and did not see Appellant for about three weeks. Id. Ginger resumed seeing Appellant after learning that Dianne had not stopped seeing someone else. (T. 1852-53).

On the Sunday before the murders occurred on Thursday, Roy Lee came to Appellant's house on a Sunday morning; Ginger's car was out front but she hid from him. Id. She then saw Roy Lee and Appellant standing outside; after they came inside, she overheard Roy Lee tell Appellant that he knew Ginger was in the house and for Appellant to tell her what he had said. (T. 1854). When she later asked Appellant what his father had

said about her, Appellant refused and told her not to worry about it. Id. They fought and she began to leave. (T. 1854-55). He asked her not to leave, but she refused because she knew his father did not want her there. (T. 1854-55). Appellant said, "You don't have to worry about this because this won't go on much longer." (T. 1855). On Wednesday night, Appellant and Ginger stayed at her trailer. (T. 1858). On Thursday, March 19, the day of the murders, Appellant was gone when she woke up but returned after lunch and asked if she could go out that night. (T. 1859). They eventually rented a motel room at the Big Five Motel in Calhoun, Georgia that evening. (T. 1871-73). They left at 9:00 a.m. on Friday morning and went back to Appellant's hometown. (T. 1874-76). As they passed Watson's store, Appellant noticed that his mother's car was not parked there. (T. 1876). Appellant remarked that he thought his father probably had not gone to work that day, either, and that they were looking for him. (T. 1876). Appellant later dropped her off at her mother's house. When she next saw Appellant on Saturday morning, she told him that people were saying he had killed his parents. (T. 1881-82). He replied that he thought people would say that. Id. He told her that only his mother's pocketbook was missing from the house. Id.

Ginger identified state's exhibit number twenty-two as her rifle; she only used purple shells with number eight shot in it and it had been cleaned after she last used it. (T. 1883, 1980, 1892). This was identified as the murder weapon. (T. 2232-34).

Ginger had introduced Appellant and his wife to the practice of injecting ground-up diet pills. (T. 1844, 1986-88). She was familair with Appellant's drug usage and his behavior after using drugs. Id. On the night of March 19, 1981, Appellant did not act any differently or under the influence of any drugs in her opinion. (T. 1903-1904). She and Appellant did not do any drugs on that night. (T. 2031).

Appellant had once told Ginger that his mother indicated she was going to hospitalize him for drugs. (T. 2039). He told Ginger he was not worried about that. Id. On another occasion, as they stood out in the yard of his house, he told her that all of the land in sight belonged to his parents. (T. 2042). He said, "If anything ever happens to them I get all this and $50,000." Id.

Dianne Romine Carter, Appellant's ex-wife at the time of resentencing, testified that she first met him at the Church of God in the late sixties and that they were married in June 1970. (T. 2110-11). They lived in a trailer next to his parents for which his parents had arranged a loan. (T. 2111-12). They initially had a good marriage, were active in the church, sang in a gospel group, and Appellant preached. (T. 2112-13). After six months, little things began creeping into their marriage;Appellant also starting changing jobs, drinking a little and seeing other women. (T. 2113-14). They separated for two and a half years sometime after their first child was born. (T. 2414-15, 2117). In 1976, the couple reunited, but Dianne had mixed feelings about their reunion. (T. 2119-20). Then, Appellant lost his driver's license because of speeding tickets, and she had to work, although she was pregnant at the time. (T. 2121-22). Around Christmas of that year, she found Appellant with another woman. (T. 2122-23). Things eventually got better between the two, however, and they decided to build a house next to his parents in 1980. (T. 2122-24). At this point, she was working in the sheriff's office, and she became friends with Ginger McIntyre. (T. 2124-26). Ginger began visiting her house a lot, and Ginger's interest in Appellant became obvious. (T. 2126). Ginger and Appellant got together in October, so Dianne started seeing Doug Rich in December. (T. 2127). Three or four weeks after she met Ginger, Ginger taught them how to inject the diet pills Dianne had previously been taking for a weight problem. (T. 2131). Dianne eventually tired of their lifestyle and

drugs and asked Appellant for them to straighten out their lives. (T. 2128). Appellant refused and said he was through with her. Id. They got into a fight, and he broke her glasses. Id.

Dianne began living with Doug Rich about two or three weeks before the murders. (T. 2133-34). The morning after the murders had occurred, Ginger pulled up with Appellant in his car, and Ginger got out and asked Dianne if she wanted to get drugs. Id. Dianne said no, so Ginger left. Id. Later, Ginger returned and told Dianne Appellant's parents were dead and that someone had broken in and stabbed them. Id. Ginger drove Dianne to Appellant's aunt's house. (T. 2143). Dianne, her father, and Appellant picked up their child from school, and she then went with Appellant to his parent's house. Id. They eventually returned to their house to wait. (T. 2144). Appellant told her that police would probably search their own house so that they should get rid of some old marijuana. (T. 2146). Dianne stuffed it in some bags and put it in a closet. (T. 2147). Appellant later got the bags, which were apparently stored in one big bag, out of a closet, and they took it to her parents' house where Appellant burned the bag in her father's trash barrel. (T. 2147). Dianne never looked inside this bag. (T. 2148). Dianne and the children visited Appellant at the jail after he had sent word that he wanted to see them. (T. 2150, 2160). He told her that he had wanted to tell her and the kids about the incident and said he never would have done it if he had been in his right mind. (T. 2160). Appellant said he had not been able to sleep until he got it off his chest and that maybe this was God's way of bringing him down. (T. 2161). Appellant told Dianne about a packet of things under the carpet of the driver's side of his car, which Dianne later retrieved and then turned over to the G.B.I. (T. 2161-63). Avilee's payroll check was in the packet of items she retrieved from the car. (T. 2202).

Dr. Byron Dawson testified that Avilee suffered one gunshot wound entering the chest and exiting her back. (T.1934-35). Twelve to fifteen puncture wounds surrounded the wound. (T. 1935). The cause of death was internal loss of blood from lacerations to blood vessels in the lung as a result of a gunshot. (T. 1935-36). Dr. Dawson also testified that Roy Lee suffered a gunshot wound to the back. (T. 1920). The cause of death was internal hemorrhaging from lacerations to the chest organs as a result of a gunshot. (T.1926). Both victims died within a matter of minutes. (T. 1941-44).

State firearms examiner Kelly Fite examined the pellet pattern on Avilee's raincoat and Roy's shirt to determine a muzzle-to-target distance. (T. 2237-2239). He also visited the scene of the crime and observed the pellet pattern in the wall at the Romine residence. (T. 2249). Fite concluded that Avilee was shot from a distance of four feet and Roy was shot from a distance of seventeen feet. (T. 2237-39). He compared the waddings found at the scene with Ginger's shotgun and concluded they were fired from this gun. (T. 2232-34).

Appellant was arrested on March 24, 1981, and subsequently gave authorities a written and signed confession. (T. 2350, 2351-53). A Jackson-Denno hearing was held at the initial trial of this case, where the trial court ruled that the statement was intelligently and voluntarily given. (T. 2243). In the statement, Appellant said he dropped Ginger at her parents' house and then went to her trailer and got her gun. (T. 2351-53). Appellant then went to his parents' house at 3:20 and waited on them. Id. In the interview on March 24, Appellant stated that he shot his parents but that he was on drugs at the time. (T. 2351-53). Prior to the interview, however, Appellant had told another G.B.I. agent that the last drug he had taken was a diet pill three weeks earlier and that he had not smoked marijuana for two months. (T. 2512). Appellant interrupted the interview to ask Sheriff Wofford what they would do to him. (T. 2515-17). Appellant stated that

before he went to his parent's home on March 19, he took two hits of acid. (T. 2351-53). Appellant said that in 1972, his parents had hospitalized him for six months because of drugs. Id. He stated that his parents found out that he was on drugs and planned to send him back to the hospital but he did not want to go. Id.

Following Appellant's arrest Appellant told G.B.I. Agent Stanley Thompson that he had put Avilee's purse in Young's trash barrel. (T.2519; 2529). Investigators recovered the debris from the trash barrel and found a metal tool, a metal frame of a small coin purse, and metal items used in the construction of a purse, such as a triangle shaped frame, metal rings, zipper and zipper handle. (T. 2529-30).

Dr. Shelton Cohen, a psychiatrist, had been retained by Appellant prior to the first trial in this case. (T. 2473-74). Appellant had told him of his upbringing, his employment history, and his drug use. (T. 2475-76). The psychiatrist testified that amphetamines are "super stimulants" which usually will make a user more alert and more active. (T. 2477). The psychiatrist found that Appellant had "very mixed feelings" towards his parents as he respected them but also resented them because of the restrictions that they had placed on him. Id. Although Appellant had obviously kept these feelings in check, his inhibitions somehow dissolved so that he "got into a murderous rage and killed them." (T. 2478).

Stewart Brown worked at a radio shop in Jasper in March, 1981. (T. 2490-91). He sold two radios to Appellant. (T. 2491-92). The signature on the check was that of Roy Lee Romine. Id. When the employee deposited the check a couple of days later, the bank called him and told him to pick it up because of insufficient funds. (T. 2493, 2495).

John Early was a pharmacist to whom Appellant presented a prescription for prelud in on February 20, 1981. (T. 2498). The pharmacist noticed that the handwriting was not that of the

doctor who purportedly signed it. Id. The pharmacist told Appellant that he did not have the drug in stock and to come back after he had ordered it. Id. Upon contacting the doctor and verifying that the doctor did not write the prescription, the pharmacist contacted the area state drug inspector. (T. 2499). Appellant returned a few days later and was given only three pills, pursuant to the drug inspector's instructions. (T. 2500). Charges were later made against Appellant. (T. 2501; 2505).

Appellant presented the testimony of four witnesses in mitigation, including his grandfather, Ralph Romine. (T. 2551; 2560; 2572; 2680). Appellant also testified in his own behalf. (T. 2589). Appellant testified that Ginger was at the house with him and implied that Ginger killed his parents. (T. 2621-24). Appellant stated that he was "messed up" on drugs at the time. Id. Appellant also testified that Dianne had thrown his mother's pocketbook into the fire. (T. 2638). Appellant denied killing his parents. (T. 2639).

The jury found the existence of one statutory aggravating circumstance as to each count of murder and recommended that a death sentence be imposed as to each count. (T. 2932). Following a poll of the jury (T. 2933-40), the trial court sentenced Appellant to death on each murder count. (T. 2940-44).

Further facts will be discussed as necessary in order to more thoroughly address the issues presented in the instant petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. AS THE STATE APPELLATE COURT DECIDED PETITIONER'S CONTENTIONS REGARDING THE GIVING OF AN ALLEGED "ALLEN CHARGE" UPON AN INDEPENDENT AND ADEQUATE STATE GROUND, THIS COURT SHOULD DECLINE TO CONSIDER ANY FEDERAL CONSTITUTIONAL ISSUE.

Petitioner has urged this Court to grant certiorari on the issue of whether or not the trial court's giving of an alleged "Allen[1] charge" violates the Eighth and Fourteenth Amendments. The Supreme Court of Georgia decided this issue upon an independent and adequate state ground and did not reach any federal constitutional claim. The court found it a misnomer to label the supplemental instructions as an "Allen charge" and further held that the supplemental instructions were fair and accurate. Thus, in that the state appellate court decided this issue upon an independent and adequate state ground, this Court should also refuse to reach the merits of any federal constitutional issue. Michigan v. Long, 463 U.S. 1032 (1983); Henry v. Mississippi, 379 U.S. 433 (1965); Herb v. Pitcairn, 324 U.S. 117 (1944).

In the court below, Petitioner initially complained that the trial court erred in refusing to grant a request for mistrial after the foreman announced that the jury was allegedly "deadlocked." The state appellate court noted that a motion for mistrial based upon the length of a jury's deliberation is within the sound discretion of the trial court. Romine v. State, 256 Ga. at 524. The state appellate court further noted that the trial court "is not bound to accept the jury's feeling that it is hopelessly deadlocked."

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[1] Allen v. United States, 164 U.S. 492 (1896).

Romine v. State, 256 Ga. at 524, citing Todd v. State, 243 Ga. 539, 542, 255 S.E.2d 5 (1979).

The state appellate court noted that the thrust of Petitioner's legal argument was that because the States of Florida and Deleware had disapproved the giving of Allen charges, Georgia should follow accordingly. Id. at 524-25. The state appellate court expressly distinguished the Deleware and Florida death penalty statutes and cited long-standing Georgia precedent that "under Georgia law a jury is expected to review the evidence and to endeavor to reach unanimity 'one way or the other' on the question of sentence, and, if possible, to affirmatively and unanimously recommend either death or mercy." Romine v. State, 256 Ga. at 525. The court further noted, "Because either verdict must be unanimous, and because the jury is not informed of the consequences of its inability to reach a verdict as to sentence, instructions to deliberate further simply do not have the effect of suggesting to a Georgia jury that it should return a death sentence." Romine v. State, 256 Ga. at 525. The state court concluded as follows:

> Consistent with our previous cases, we hold as follows: (1) where a jury is unable to agree on a verdict, that disagreement is not itself a verdict; and (2) whether a jury is hopelessly deadlocked is an evaluation we commit to the sound discretion of the trial court, subject to appellate review for an abuse of discretion.

Romine v. State, 256 Ga. at 525.

Further, as a factual matter the state appellate court noted that the trial in this case, including the presentation of evidence, arguments and instructions, "took the better part of seven days." Romine v. State, 256 Ga. at 525. The court noted that "after less than four hours of deliberation" the jury foreman reported a "wide division" and expressed doubt about the possibility of reaching a verdict. Id. The court noted that after three additional hours of deliberation, the

jury foreman expressed more doubt about ability to reach a verdict but noted, however, that the jury had made considerable progress and that the division had narrowed "significantly." Romine v. State, supra. The state appellate court concluded, "Considering the length and complexity of the trial, the length of time the jury deliberated before declaring itself deadlocked, and the amount of progress made in the interim, we find no abuse of discretion in the court's refusal to declare a mistrial." Romine v. State, 256 Ga. at 526.

With regard to the issue of the propriety of giving an "Allen charge", the state appellate court noted that because of the decades of decisions regarding Allen v. United States, supra, it was a misnomer to refer to "a single Allen charge." Romine v. State, 256 Ga. at 526. The court noted that one of the most commonly-made observations of this type of charge was the danger that the jurors in the minority would be admonished to rethink their position in light of the majority's views so that the instruction could in effect be "coercive" upon the minority view. Romine v. State, 256 Ga. at 527. The state appellate court further noted, however, that unless a trial court must declare a mistrial, and the court noted that it had just previously held to the contrary, "then some supplemental instructions concerning further deliberations are desireable, perhaps even necessary." Romine v. State, 256 Ga. at 527. The state appellate court then reviewed a commentary to Rule 15-4.4(b) of the A.B.A. Standards for Criminal Justice, noting that while the A.B.A. view was that an Allen charge should not be used, it was appropriate for a trial court to give or repeat an instruction to the jury regarding its responsibilities in deliberating where the instruction addressed five points: (1) that in order to return a verdict, each juror must agree to the verdict; (2) that jurors had a duty to consult with each other and to deliberate with a view towards reaching an agreement, if possible; (3) that each juror must decide the case him or herself but should endeavor to consider the evidence in an

impartial light; (4) that during deliberations, a juror should not hesitate to re-examine his or her view and change an opinion if the juror concluded the opinion was erroneous; and (5) no juror should surrender an honest conviction solely because of the views of other jurors. Romine v. State, 256 Ga. at 527. The state appellate court concluded that the "supplemental instructions" given in the instant case were consistent with the five aforementioned points. Romine v. State, 256 Ga. at 527. The court further noted that the supplemental instructions here "did not single out jurors in the minority as being the only ones who might reasonably be asked to re-examine their views, or erroneously imply that a mistrial would result in a retrial." Romine v. State, 256 Ga. at 527_. The state appellate court concluded, "The supplemental instructions given here were fair and accurate." Id. The court concluded that the trial court did not abuse its discretion in giving the supplemental instructions. Id.

Respondent submits that a review of the decision of the court below shows that the court determined the issues of the propriety of the supplemental instructions as well as whether or not the instructions were erroneous in this case upon an independent and adequate state ground and, thus, did not reach any federal constitutional question. Thus, Respondent would urge this Court to decline to review the federal constitutional issues raised by Petitioner in the instant petition as these issues were not reached below.

II. AS THE PROPRIETY OF THE SENTENCING CHARGE WAS DECIDED BY THE COURT BELOW UPON AN INDEPENDENT AND ADEQUATE STATE GROUND, THIS COURT SHOULD DECLINE TO CONSIDER PETITIONER'S FEDERAL CONSTITUTIONAL QUESTIONS.

In the second issue presented to this Court for review, Petitioner contends that a portion of the trial court's charge at the resentencing phase had the effect of precluding consideration by the jury of allegedly mitigating evidence. Petitioner contends that the effect of these instructions resulted in an Eighth and Fourteenth Amendment violation. A review of the state court decision, however, shows that the state appellate court decided this allegation upon an independent and adequate state ground.

A review of the record in this case shows that the state appellate court noted that Petitioner's complaints centered around the court's instruction to the jury regarding the limited purpose of evidence introduced regarding prior difficulties between Petitioner and his parents. Specifically, the charge complained of is as follows:

> I further charge you that evidence of prior difficulties between the Defendant and the alleged victims has been admitted for your consideration solely and only for the purpose of its illustrating, if it does so illustrate, the state of feeling between the Defendant and the alleged victims, and the bent of mind, and course of conduct on the part of the accused. Now, this evidence is admitted for your consideration only as it may illustrate such matters, and for no other purpose. Whether or not this evidence illustrates such is a matter solely for you, the jury, to determine, but you are not to consider such evidence for any other purpose.

(T. 2874-75). The state appellate court reviewed this claim of error arising from this charge, as well as two other claims of Petitioner regarding the trial court's instruction on voluntary intoxication, which is not a defense to any crime under Georgia law, as well as a charge that episodic amnesia is not a defense to a crime under Georgia law, to conclude that the charge as a whole did not limit the jury's consideration of mitigating circumstances. Romine v. State, 256 Ga. at 528. In this case, the court noted as follows:

> As we have noted previously, evidence relating to guilt or innocence is relevant to sentence. See Cook v. State, 255 Ga. 565, 586 (n. 11) (340 SE2d 891) (1986); Alderman v. State, 254 Ga. 206, 210(8) (327 SE2d 168) (1985); Blankenship v. State, 251 Ga. 621 (308 SE2d 369) (1983). It may have particular importance where, as here, the case is being retried as to sentence and the jury is hearing for the first time, at the sentencing phase of the trial, evidence relating to the circumstances of the offense. In this case, moreover, the statutory aggravating circumstances contended by the state were some of the circumstances of the offense, and thus, notwithstanding Romine's conviction on two counts of murder and one count of armed robbery, the state was required to prove beyond a reasonable doubt that one count of murder was committed while the defendant was engaged in the commission of the other murder, and that the other count of murder was committed while the offender was engaged in the commission of the offense of armed robbery. OCGA § 17-10-30(b)(2) and (c).

Romine v. State, 256 Ga. at 528.

The state appellate court noted that at this resentencing trial, Petitioner "vigorously denied" committing these offenses. Romine v. State, 256 at 528. Petitioner contended at his resentencing trial that he had been drugged by his girlfriend so that he was only marginally aware of what he was doing when the crimes were committed, that his girlfriend was the actual murderer, and that he had confessed prior to the original trial in this case partially because of drug-induced hallucinations and partially out of a desire to protect his girlfriend. Romine v. State, supra. The state appellate court held:

> Because this was a retrial as to sentence in which the defendant disputed his guilt, the court was required to include in its instructions matters that ordinarily would have been covered in the charge at the guilt-innocence phase of the trial, including credibility of witnesses, expert testimony, definitions of the crimes charged, and theories of criminal liability.

Romine v. State, supra.

The state appellate court found that "the jury could not reasonably have concluded from the charge as a whole the defendant's prior difficulties with his parents could not be considered in mitigation." Romine v. State, 256 Ga. at 529. The state appellate court cited other portions of the trial court's charge on mitigating circumstances, including language which stated that "a jury must be allowed to consider on the basis of all relative [sic] evidence, not only why a death sentence should be imposed, but also why it should not be imposed. The jury should consider as a mitigating factor any of the circumstances of the offense that the Defendant proffers

as a basis for a sentence less than death." Romine v. State, 256 Ga. at 529. The state appellate court further noted that the jury was specifically told that the jury could impose a life sentence, notwithstanding the fact the jury might find the existence of statutory aggravating circumstances. Id. The jury was also told that the jury could impose a life sentence based upon any mitigating or extenuating facts or for any reason or no reason, whether or not the jury found the existence of any mitigating circumstances in this case. Id. The jury was further instructed, "I charge you that the jury is empowered to consider as mitigating anything they find to be mitigating without limitation or definition. I further charge you that the jury is not required to find any mitigating circumstances in order to make a recommendation of mercy that is binding on the Court." Romine v. State, 256 Ga. The state appellate court concluded as follows:

> The court's instructions on mitigating circumstances--which are even more extensive than we set forth above, and which, at the jury's request, were repeated in full midway through the jury's deliberations--are sufficiently clear, comprehensive and complete to dispel any reasonable possibility that the jury felt at all restricted in its consideration of mitigating circumstances.

Romine v. State, 256 Ga. at 530.

The record in the court below shows that the state appellate court reviewed this claim of error solely under state law and did not reach any federal constitutional question. Accordingly, as the decision of the court below rest upon an independent and adequate state ground, Respondent would urge this Court to decline to review this issue.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the decision of the court below sought to be reviewed rests upon an independent and adequate state ground.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day timely served a true and correct copy of this brief in opposition for Respondent by depositing a copy of same in the United States mail, with sufficient postage fixed thereon and addressed to:

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This 20th day of March, 1987.

Paula K. Smith

PAULA K. SMITH
Assistant Attorney General
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86- 6384

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LARRY ROMINE,

Petitioner,

vs.

APR 17 PAGE 8

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86- 6304

LARRY ROMINE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF GEORGIA

PETITIONER'S REPLY BRIEF

In its Brief in Opposition to Petitioner's Petition for Writ of Certiorari, the Respondent suggests that this Court cannot review Petitioner's federal constitutional questions because the decision below is based upon independent and adequate state grounds. The Respondent does not contend that the questions presented in this Petition are not substantial federal questions. Neither does the Respondent contend that these federal questions were not properly raised and presented in the trial court and in the Supreme Court of Georgia. Rather, the Respondent contends that the Supreme Court of Georgia's failure to address Petitioner's properly raised federal constitutional questions is sufficient to defeat this Court's jurisdiction.

Contrary to Respondent's position, as is set out more fully herein, the Supreme Court of Georgia addressed the federal constitutional questions presented in this Petition and decided them adversely to Petitioner. Moreover, inasmuch as these federal questions are controlling, the state law grounds of the decision below can be neither independent nor adequate to support the decision. Therefore, this Court should grant the Petition for the reasons set forth therein.

In the Supreme Court of Georgia, Petitioner contended that no matter how it is modified, an Allen charge, when given in the sentencing phase of a capital murder trial where the inability of the jury to reach a unanimous verdict results in a life sentence, is impermissibly coercive and fundamentally unfair in violation of the Eighth and Fourteenth Amendments.[1] The Supreme Court of Georgia stated this issue by quoting verbatim from Petitioner's second enumeration of error: "Romine next contends that 'the Allen charge...is impermissibly coercive when given in the sentencing phase of a death penalty trial.'" Romine v. State, 256 Ga. 521, 526 (1986) (emphasis added).

Having stated the federal constitutional question, the court proceeded to address it and decide it adversely to Petitioner. The court held that "the Allen charge given here was fair and accurate". Romine v. State, 256 Ga. at 527 (emphasis added). By holding that the Allen charge was fair, the court necessarily rejected Petitioner's federal conetitutional argument that the charge was impermissibly coercive and unfair.

The Respondent's argument that the court did not address Petitioner's federal question concerning the trial court's charge

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1. This issue cannot be decided by simply calling the trial court's charge "supplemental instructions" instead of an Allen charge. Petitioner is attacking not the name given to the charge but the language contained in the charge. The charge is unconstitutional regardless of what state law may call it.

that the jury could not consider the evidence of Petitioner's prior difficulties with his parents in deciding what sentence to impose is not easy to follow because nowhere does the Respondent suggest what the non-federal grounds of the decision might be. Petitioner's argument in the Supreme Court of Georgia in this regard was that the trial court impermissibly prohibited the jury from considering relevant mitigating evidence contrary to Lockett v. Ohio, Eddings v. Oklahoma, and the Eighth and Fourteenth Amendments. No other argument was made. By holding that the charge as a whole did not limit the jury's consideration of relevant mitigating evidence, the Supreme Court of Georgia addressed and rejected Petitioner's federal claim.

This Court clearly has jurisdiction to review federal questions that the Supreme Court of Georgia addressed and decided adversely to Petitioner. Inasmuch as the Supreme Court of Georgia specifically addressed Petitioner's federal questions, the Respondent's argument amounts to little more than speculation that it might have been possible for the court to have decided the issues based upon state law. This is not sufficient to defeat this Court's jurisdiction. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977).

Even had the Supreme Court of Georgia not expressly addressed Petitioner's properly raised federal questions, a state court cannot defeat this Court's jurisdiction by refusing to address properly raised and controlling federal questions. More than fifty years ago, this Court recognized that federal rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Lawrence v. State Tax Commissioner, 286 U.S. 276, 282 (1932). Petitioner's federal questions were properly raised. If decided adversely to state

law, they were controlling.[2] Under these circumstances, the Supreme Court of Georgia cannot "defeat federal review merely by issuing a tight-lipped decision in favor of the challenged state law." (Language quoted from Super Tire Engineering Co. v. McCorkle, 550 F.2d 903, 907 (1977). See Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940). It is important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.).

CONCLUSION

The petition for the writ of certiorari to the Supreme Court of the State of Georgia should be granted.

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2. The controlling question as to the Allen charge is whether or not it violates the Eighth and Fourteenth Amendments when given in the sentencing phase of a death penalty trial. If the charge is unconstitutional, nothing decided as a matter of state law can make it constitutional. These state law grounds can be neither independent nor adequate because federal law is controlling and the state law grounds are so interwoven with the federal grounds as not to be independent. Michigan v. Long, 463 U.S. 1032 (1983); Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, 164 (1917). The same is true with respect to the prior difficulties charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I served copies of the annexed Reply Brief of Petitioner on Respondent by depositing copies in the United States Mail, first class mail, postage prepaid, addressed as follows:

Hon. Michael J. Bowers, Attorney General
Hon. Paula K. Smith, Assistant Attorney General
132 State Judicial Building
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Hon. Roger Queen
District Attorney
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All parties required to be served have been served. Done this 14th day of April, 1987.

Thomas P Lenzer

THOMAS P. LENZER
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Larry Romine

SUPREME COURT OF THE UNITED STATES

LARRY ROMINE *v.* GEORGIA

ON PETITION FOR REHEARING

No. 86–6384. Decided January 25, 1988

The petition for rehearing is denied.

JUSTICE MARSHALL, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case.

II

Even if I did not hold this view, I would vacate petitioner's sentence of death for reconsideration in light of this Court's recent decision in *Lowenfield* v. *Phelps*, 484 U. S. —— (1988). The Court in *Lowenfield* rejected a claim, similar to the one advanced by petitioner in this case, that the administration of an *Allen* charge to a capital sentencing jury was coercive. The Court recognized, however, that such a charge must be considered "'in its context and under all the circumstances.'" *Id.*, at —— (quoting *Jenkins* v. *United States*, 380 U. S. 445, 446 (1965) (*per curiam*)). Moreover, the Court explicitly limited its holding to the facts of the case before it, stating that "we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion." *Id.*, at ——. The circumstances surrounding the administration of the *Allen* charge in the instant case differed substantially from those in *Lowenfield*. Moreover, they did so in ways that the Court in *Lowenfield* recognized as relevant to the issue of coercion. The Georgia Supreme Court therefore should be given an

opportunity to re-evaluate petitioner's sentence in light of this Court's decision in *Lowenfield*.

Petitioner Larry Romine was convicted of capital murder and sentenced to death. His death sentence was reversed on appeal by the Georgia Supreme Court, and the case was remanded for a new sentencing trial. 251 Ga. 208 (1983). On retrial, after almost seven hours of deliberations and an overnight recess, the foreman of the jury sent the court a note that read: "We are unable to reach a unanimous decision and are certain we will not ever be able to reach one." App to Pet. for Cert. 3. The court called the jury in and inquired: "[C]an you just give me the numerical breakdown of how you stand?" *Ibid.* The foreman replied that the jury was divided 11–1. The court sent the jury back for further deliberations, over the objection of defense counsel. When the jury still had not reached a verdict five and one-half hours later, the court called the jury in again to give it "some other instructions." *Id.*, at 4. The court then administered an *Allen* charge, urging the jurors to re-examine the grounds of their opinions and attempt to reach a verdict. Two hours later, the jury returned a unanimous verdict of death.

In Georgia, as in Lowenfield's state of Louisiana, a hung jury in a capital sentencing trial results in the automatic imposition of a life sentence. See O. C. G. A. §17–10–31; *Hill* v. *State*, 250 Ga. 821 (1983); *Miller* v. *State*, 237 Ga. 557 (1976). Thus, the state's usual interest in an *Allen* charge—avoiding the societal costs of a retrial—is not present. The Court in *Lowenfield* recognized that this difference "weighs in the constitutional calculus." 484 U. S., at ——. The Court nonetheless concluded that the circumstances surrounding the administration of the charge in Lowenfield's case did not warrant a reversal on the ground of jury coercion. The discussion in *Lowenfield*, however, indicates that the circumstances relevant to petitioner's claim may produce a different result in the "constitutional calculus."

First, the jury polling that preceded the *Allen* charge in this case was far more coercive than the polling tolerated in *Lowenfield*. The Court in *Lowenfield* took great pains to establish that "the inquiry as to the numerical division of the jury was not as to how they stood on the merits of the verdict, but how they stood on the question of whether further deliberations might assist them in returning a verdict." 484 U. S., at ——. Here, the court's question undoubtedly was directed at the jury's division on the merits, placing it squarely within this Court's holding in *Brasfield* v. *United States*, 272 U. S. 448 (1926), which the *Lowenfield* Court held to be "instructive as to the potential dangers of jury polling." 484 U. S., at ——.

Second, the jury's expression of its deadlock was much more unequivocal in this case than in *Lowenfield*. In *Lowenfield*, the jury's note to the court stated that it was unable to reach a verdict *at that time*. *Id.*, at ——. In the instant case, the jury not only stated that it was unable to reach a unanimous decision, but specified that "we . . . are *certain* we will not *ever* be able to reach one." App. to Pet. for Cert. 3 (emphasis added). After such an emphatic statement of deadlock, followed by five and one-half hours of further unsuccessful deliberations, the jury may well have inferred from an *Allen* charge that the court was absolutely set on unanimity and unwilling to settle for anything less.

Third, the jury in this case did not request to be reinstructed, as did the jury in *Lowenfield*. Moreover, whereas the court in *Lowenfield* merely reiterated the part of its original jury instructions dealing with the jury's duty to deliberate with an open mind, the court's supplemental charge in this case was by its own admission different from the instructions given at the commencement of deliberations. The fact that the court summoned the jury on its own accord to deliver new and unfamiliar instructions heightened the coerciveness of the verdict-urging charge. See, *e. g.*, *United States* v. *Seawell*, 550 F. 2d 1159, 1163 (CA9 1977)

(*Allen* charge should not be given during deliberations unless jury requests it); *United States* v. *Blandin*, 784 F. 2d 1048, 1050 (CA10 1986) (*Allen* charge should be given during the court's original jury instructions rather than during the course of deliberations).

Finally, the polling in this case revealed a division of 11–1, and the trial judge knew of this division when he decided to give the *Allen* charge five and one-half hours later. Furthermore, it was clear to the lone dissenting juror that the judge knew that there was only one holdout when he decided to give the charge. In *Lowenfield*, by contrast, the jury itself had requested the charge, so the single juror identified by the second poll could not have speculated that the results of the poll motivated the judge to give the charge. The dissenting juror in each case may have interpreted the charge as being directed at him or her alone. But the administration of the charge in the instant case would have communicated to the dissenter the judge's exasperation with her failure to capitulate.

I was convinced by the circumstances surrounding the *Allen* charge in *Lowenfield* that coercion of the jury had indeed occurred. But the circumstances of the instant case are significantly more coercive than those I condemned in *Lowenfield*. The majority opinion in *Lowenfield* promised that future cases would be considered on their particular facts and that the *Lowenfield* decision did not give *carte blanche* to state trial courts to use polling procedures and *Allen* charges indiscriminately during capital sentencing proceedings. That promise requires that the Georgia Supreme Court be given an opportunity to reconsider the circumstances surrounding the *Allen* charge in this case in light of this Court's discussion of jury coercion in *Lowenfield*. I dissent.